ID 200416

SIDLEY & AUSTIN

CHICAGO
DALLAS
LOS ANGELES
NEW YORK
SEATTLE

1722 EYE STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711

FOUNDED 1866

HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8252

WRITER'S E-MAIL ADDRESS
vprada@sidley.com

November 17, 2000

By Hand Delivery

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: STB Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding on behalf of Norfolk Southern Corporation and Norfolk Southern Railway Company are a signed original and 25 copies of the "Comments of Norfolk Southern in Response to Notice of Proposed Rulemaking." Also enclosed is a computer disk containing a copy of this submission in WordPerfect 6/7/8 format.

Please acknowledge receipt of these papers for filing by date-stamping the enclosed duplicate copy and returning it to our messenger. Thank you for your attention to this matter.

Very truly yours,

G. Paul Moates
Vincent F. Prada

Enclosures

cc: All Parties of Record (w/encl.)

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF NORFOLK SOUTHERN IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

J. Gary Lane
Joseph C. Dimino
George A. Aspatore
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2600

G. Paul Moates
Jeffrey S. Berlin
Vincent F. Prada
Constance A. Sadler
Krista L. Edwards
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
(202) 736-8711 (fax)

Attorneys for Norfolk Southern Corporation and Norfolk Southern Railway Company

DATED: November 17, 2000

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF NORFOLK SOUTHERN IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

Pursuant to the Board's Notice of Proposed Rulemaking ("NPR"), served October 3, 2000, Norfolk Southern Corporation and Norfolk Southern Railway Company (jointly, "NS" or "Norfolk Southern") respectfully submit these comments on the Board's proposed modifications to its regulations governing proposals for major rail consolidations.[1] NS's suggested textual revisions to the Board's proposed new rules are set forth in Attachment A.

INTRODUCTION AND SUMMARY

The Board's proposed new merger rules represent a diligent and productive effort to update the 20-year old Railroad Consolidation Procedures and tailor them to the public policy issues likely to be posed by the next round of major rail consolidation transactions. NS supports the Board's proposals to place greater emphasis in the merger review process on improving the

[1] Unless otherwise noted, abbreviations used in these comments conform to those listed in Appendix A of the NPR (at 69-76). NS's opening and reply comments filed in response to the Board's March 31, 2000 Advance Notice of Proposed Rulemaking ("ANPR") will be cited as "NS ANPR Opening" and "NS ANPR Reply," respectively. As in its ANPR comments, NS uses the term "merger" as a shorthand reference to all mergers, consolidations, acquisitions of control and other combinations, involving two or more Class I rail carriers, that are subject to Board review under 49 U.S.C. §§ 11321-11326.

level and quality of service that railroads provide to their customers, to give more critical scrutiny to claims of merger-related public benefits, to codify and make more systematic the Board's approach to merger implementation and potential transitional service problems, and to expand the public interest analysis to embrace transnational impacts on competition, operations and service. In light of the significant changes that have taken place in the U.S. rail industry during the past two decades and the likelihood that the next round of major rail consolidations will shape the final structure of the industry, it is appropriate that the Board's new rules and policies "raise the bar" on approval of major rail consolidations, while not deterring or foreclosing possible future combinations that could advance the public interest. *See* NS ANPR Opening at 8-12.

NS appreciates that, in developing proposed new policies and rules for assessing major rail consolidations, the Board was faced with the difficult task of accommodating a number of competing -- and sometimes conflicting -- public policy objectives. Among other things, an appropriate set of revised merger policies and rules must achieve a delicate balance between, on the one hand, providing concrete guidance to railroads proposing (and other parties having an interest in) possible future rail consolidation transactions and, on the other hand, preserving the flexibility necessary to take account of varying facts and circumstances in reaching a sensible regulatory determination in individual cases. *See* NS ANPR Opening at 6-8. In this regard, NS is concerned that, in two broad respects, the Board's proposed merger rules fail to achieve a proper accommodation of the relevant competing public policy objectives and, in particular, the need for flexibility both in the merger review and merger implementation process.

First, NS finds deeply troubling the provisions of the proposed new merger rules that would require so-called "enhanced competition" -- unrelated to the mitigation of any merger-

related competitive harm -- as a condition to approval of any future major rail consolidation. The proposed new rules would require rail merger applicants, apparently regardless of the relative public benefits or harms attributable to their proposed combination, to structure their transaction in some unspecified way so as to "enhance" (and not merely to preserve) existing competition or else face the prospect of involuntary competition-enhancing conditions imposed by the Board.

NS would have no objection to these new provisions if they were understood to mean only that a proposed major rail consolidation must, in order to obtain approval, enhance the overall competitiveness of the transportation system and vitality of competition in the markets in which railroads operate. Virtually all previously approved rail mergers in varying degrees have enhanced the competitiveness of the transportation marketplace, including strengthening competition between railroads and between railroads and other modes through service improvements, efficiencies, enhanced financial viability and other effects. Enhanced competition was a major factor in the approval of these prior mergers by the Board and the ICC. Particularly given the Board's statement that its proposed new rules represent a "paradigm shift in our review of major rail mergers" (NPR at 10), however, NS is concerned that this is not what the Board means by "enhanced competition." Instead, the proposed requirement of "enhanced competition" may be intended (or could be construed) to require rail merger applicants to submit to forced access and other measures that use regulatory mandates to manufacture additional direct rail-to-rail competition where market conditions have not produced it.

Requiring every major rail merger applicant (regardless of individual circumstances) to accept measures for additional rail access or other increases in existing rail-to-rail competition as a precondition to approval of a major rail consolidation would be a serious

mistake. The Board's NPR seeks to justify its proposed new requirement on the ground that "enhanced competition" is necessary to offset merger-related public harms. The fallacy in this reasoning, however, is that there is no adequate factual predicate for the Board's apparent *presumption* that future major rail consolidations would generate no significant public benefits, that they would result in irremediable competitive harm and that they would cause significant transitional service problems. Adopting any such presumption would be unjustified, and could have the effect of discouraging the proposal of beneficial rail combinations and, in the process, freezing the future structure of the rail industry without regard to changing market conditions.

Even if there were an adequate factual predicate for the Board's presumption of merger-related public harms, there is no basis for the Board's additional (although unstated) presumption that the imposition of measures to increase rail-to-rail competition will invariably or unequivocally produce offsetting public benefits. In fact, measures to increase rail-to-rail competition may produce public benefits, but they also can increase rail operating costs and traffic congestion, complicate and impair the quality of rail service provided to customers, undermine the ability of railroads to charge rates that cover their full economic costs (including fixed and common costs) and, ultimately, reduce economic incentives for investment in service-enhancing infrastructure and equipment. Far from offsetting merger-related harms, forced access measures may create their own harms. The Board's proposed rules fail to account for the complexity, uneven effects and costs of increased rail-to-rail competition.

The Board's proposal to require "enhanced competition" also is unsound because, even if there were identified merger-related public harms that could be offset through increased rail-to-rail competition, there is no connection between the presumed harms and the mandated

"remedy." For example, there is no logical nexus between possible *temporary* merger-related service disruptions and the presumably *permanent* forced access measures that the Board might impose as an offsetting benefit. More generally, the Board's proposed new merger rules impose a mandatory requirement of "enhanced competition" but provide no guidance as to the type or scope of "enhanced competition" that will be required in a particular case. As in the case of the broad "open access" reforms advocated by many shippers but rejected by the Board, there is no principled basis for deciding which shippers or facilities are entitled to measures increasing the number of railroads serving them, and which shippers or facilities are not. This lack of coherent objective standards for applying the Board's proposed requirement of "enhanced competition" is extremely problematic, and threatens to embroil every future major rail consolidation proceeding in open-ended demands by hosts of shipper interests for competition-enhancing conditions opening up solely served rail facilities throughout the applicant carriers' systems.

For these reasons, the Board's proposal to require "enhanced competition" as a condition to approval of future major rail consolidations is a bad idea, and the portions of the proposed merger rules embodying this requirement should be eliminated. This is not to say, however, that the promotion of increased rail-to-rail competition should not be a relevant -- indeed, an important factor -- in weighing the public interest in future rail consolidations. As NS suggested in its ANPR comments, the Board should welcome proposals by rail merger applicants to increase rail-to-rail competition when such measures can be justified as consistent with the overall structure and anticipated effects of the proposed transaction, and when the relative costs and benefits of such measures are the product of private sector initiatives rather than government regulation. *See* NS ANPR Opening at 6. But such private sector measures to increase rail-to-rail

competition should be encouraged (and given substantial weight in the approval process), not mandated by government order in every transaction regardless of circumstances. Otherwise, the Board's proposed merger rules risk deterring otherwise beneficial rail merger transactions or, potentially, introducing the very system of mandatory forced access that the Board so rightly rejected as inappropriate in the merger review context.

Second, NS is concerned that certain of the Board's proposed new merger rules imply a level of quantitative precision in the calculation of projected merger benefits and clairvoyance in predicting the effects of a proposed transaction (particularly during the merger implementation period) that go beyond what may reasonably be expected of any rail merger applicant. Among other things, the Board's proposed rules appear to require a more detailed showing by applicants of the specific benefits they claim their consolidation will produce (emphasizing quantification of such benefits), the development of contingency plans if projected benefits and service levels are not actually achieved as promised in the application, and the retention of broad jurisdiction by the Board to impose post-approval conditions if the projected benefits and service levels are not realized as originally projected.

NS understands the Board's desire to fashion regulatory procedures and rules aimed at reducing the possibility that future major rail consolidations will experience the kinds of unfortunate (but temporary) service disruptions that attended the Conrail transaction, the UP/SP merger and other recent major rail consolidations. Rail merger impact analyses, however, necessarily represent good-faith predictions of future impacts based substantially on historical traffic and other data. In actuality, rail consolidations are never implemented in the "base" year used for merger impact analysis, but are affected -- often significantly and in unforseen ways -- by

ever-changing, dynamic market conditions. Operating plans, service assurance plans and even merger implementation plans -- even if eminently sound when originally crafted -- must inevitably be refined and revised in response to changing market conditions. Requiring perfection and clairvoyance in merger impact analyses is therefore akin to requiring the impossible, and imposing (or threatening to impose) sanctions in the form of costly or burdensome post-approval conditions when original merger plans cannot (even for good and sound reasons) be realized would be useless at best and counterproductive at worst. Accordingly, in order to ensure that the Board's new rules will not be construed to impose such unrealistic requirements, the Board should make limited revisions in the proposed rules so as to require good-faith merger impact and service assurance analyses, and to monitor implementation of the approved transaction, while not converting static merger impact analyses into unrealistic regulatory straitjackets on sound rail operations.

DISCUSSION

The NPR proposes significant changes both in the broad policy factors that the Board weighs in assessing whether a proposed major rail consolidation is consistent with the public interest, and in the specific evidentiary and procedural rules governing the merger review process. In assessing the desirability of the proposed new rail merger rules, NS has been guided -- and urges that the Board be guided -- by the following general principles:

(1) The Board's rail merger review process should seek to promote the development and maintenance of a sound rail transportation system capable of providing safe, efficient and reliable transportation services that satisfy the needs of the shipping public, and reasonable rate levels that generate adequate revenues necessary to sustain the system in the long term.

(2) The Board's rail merger review process should, as in other areas of railroad regulation, rely to the greatest extent possible on the marketplace and private initiative rather than on government regulation to promote a sound rail transportation system

(3) The Board's rail merger review process should recognize that competition is valued because, and to the extent that, it promotes the provision of safe, efficient and reliable rail transportation services at reasonable, self-sustaining rates.

(4) The Board's rail merger review process should promote, not undermine, the efficiencies of the national rail network, including the exploitation of available economies of scale, scope and density.

(5) The Board's rail merger review process should avoid the imposition of regulatory conditions or requirements that would undermine economic incentives for efficient investment in rail infrastructure and equipment.

(6) The Board's rail merger review process should carefully assess the probable effects of a proposed rail consolidation while not impairing the ability of carriers to respond to changing market and business conditions.

(7) The Board's Railroad Consolidation Procedures should identify the broad public interest factors that will be given consideration in the rail merger review process and define general evidentiary and procedural requirements for rail merger proceedings, while preserving flexibility in how these policies and rules will be weighed and applied in individual cases.

As explained below, the Board's proposed new rail merger rules for the most part represent a productive step forward in promoting these broad public policy objectives. In several important respects, however, the proposed rules fall short, and would impose requirements that would deter otherwise beneficial rail merger proposals and undermine the fundamental public interest in promoting a sound, healthy and competitive rail system.

I. PROVISIONS FOR "ENHANCED COMPETITION"

For more than half a century, national policy toward railroad mergers and consolidations has been guided by two fundamental principles. First, beginning with the enact-

> [W]e should not use our conditioning powers to make consolidation proceedings vehicles for rail system restructuring. To do so would not be consistent with the Congressional intent underlying the statutory scheme governing railroad consolidations. Between 1920 and 1940 this Commission had a statutory role in the planning of rail system restructuring through mergers and consolidations. That statutory scheme proved ineffective and since 1940 rail system restructuring has been left primarily to the initiative of the private sector. Under this statutory scheme, our role in merger proceedings is to evaluate carrier-originated proposals to determine whether they are consistent with the public interest. To the extent governmental assistance is beneficial in formulating rail restructuring plans, DOT has statutory authority to provide such assistance. Further, the imposition of conditions on a transaction creates a disincentive for the parties to consummate the transaction. Therefore, the imposition of conditions not related to possible adverse impacts of a consolidation might cause carriers to forego a consolidation that would, without conditions, yield net public benefits.

UP/MP, 366 I.C.C. at 563-64 (citation omitted).

The Board's proposed new merger rules signal a potentially profound reversal of these fundamental principles of railroad merger review. Describing its proposed rules as "a paradigm shift in our review of major mergers" (NPR at 10), the Board proposes to "upgrade the importance of competition" in its review of major rail merger proposals (*id.* at 12). The Board would do so by incorporating in its merger rules a seemingly absolute *requirement* that rail carriers proposing *any* major rail consolidation affirmatively provide for what the Board calls "enhanced competition" -- unrelated to the existence, much less the amelioration, of any merger-related competitive harms -- or face the prospect of involuntary competition-enhancing conditions imposed by the Board. The NPR thus proposes to modify the rail merger policy statement as follows:

> Although the Board cannot rule out the possibility that further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system

> integration period. To maintain a balance in favor of the public interest, *merger applications must include provisions for enhanced competition. Unless merger applications are so framed, approval of proposed combinations where both carriers are financially sound will likely cause the Board to make broad use of the powers available to it in 49 U.S.C. 11324(c) to condition its approval to preserve and enhance competition.*

NPR at 12 (proposed 49 C.F.R. § 1180.1(c)) (emphasis added).

The Board's proposed rules reinforce and apply this requirement of "enhanced competition" in several respects. In discussing potential merger-related public harms, the Board's proposed new policy statement provides that, "[t]o offset harms that would not otherwise be mitigated, applicants shall explain how the transaction and conditions they propose will enhance competition." NPR at 15 (proposed § 1180.1(c)(2)). Similarly, the Board's proposed policy statement on merger conditions declares that, "to offset these [presumed merger-related] harms, applicants will be *required* to propose conditions that will not simply preserve but also enhance competition." *Id.* at 16 (proposed § 1180.1(d)) (emphasis added). And, in prescribing evidentiary requirements for major rail consolidation applications, the proposed rules provide that "[a]pplicants must explain how the transaction and conditions they propose will enhance competition and improve service." *Id.* at 31 (proposed § 1180.6(b)(10)).

NS would have no quarrel with these provisions for "enhanced competition" if they were understood to mean only that a proposed major rail consolidation, in order to obtain the Board's approval, must enhance the overall competitiveness of the transportation system and the competitive vitality of particular rail systems within the relevant transportation markets in which they compete. That would be consistent with the basic policies that, quite properly, have informed railroad merger review for decades. Competitive rivalry does serve the public interest, by stimulating railroads and other transportation companies to provide adequate, efficient service

at reasonable, self-sustaining rates. In this sense, indeed, virtually all railroad consolidations previously approved by the Board and the ICC in varying degrees have "enhanced competition" by, among other things, strengthening the effectiveness of competition between railroads and between railroads and other modes through service improvements, efficiencies, enhanced financial viability and other effects. These competition-enhancing effects provided, almost without exception, the primary public interest grounds for approval of these combinations.[3] Indeed, privately initiated rail consolidation proposals are the product of healthy competitive rivalry, as carriers strive to improve their competitive position through merger-related efficiencies. For this reason, NS strongly endorses, as consistent with the basic principles that have informed rail merger review for decades, the language in the Board's proposed new merger policy statement that "[t]he Board welcomes private sector initiatives that enhance the capabilities and the competitiveness of this [railroad] transportation infrastructure." NPR at 11 (proposed § 1180.1(a)).

NS is deeply concerned, however, that the Board has something quite different in mind in its proposal to require major rail merger applicants to demonstrate "enhanced competition." Given the Board's own description of its proposed new rules as a "paradigm shift," the Board's threat to use its rail merger conditioning power (which, by definition, extends only to the applicant railroads) to impose "enhanced competition," the Board's prior use of the term

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[3] *See, e.g.*, STB Finance Docket No. 33556, *Canadian National Railway Co. -- Control -- Illinois Central Railroad Co.* (served May 25, 1999), Decision No. 37 ("*CN/IC*"), at 20, 22; STB Finance Docket No. 33388, *CSX Corp. -- Control & Operating Leases/Agreements -- Conrail Inc.* (served July 23, 1998), Decision No. 89 ("*Conrail*"), at 50-51, 129-34; STB Finance Docket No. 32760, *Union Pacific Corp. -- Control & Merger -- Southern Pacific Rail Corp.* (served Aug. 12, 1996), Decision No. 44 ("*UP/SP*"), at 113-16; STB Finance Docket No. 32549, *Burlington Northern Inc. -- Control & Merger -- Santa Fe Pacific Corp.* (served Aug. 23, 1995), Decision No. 38 ("*BN/Santa Fe*"), at 8-10, 59-66.

"enhanced competition" in the ANPR as a short-hand reference to regulatory measures to inject additional rail-to-rail competition (ANPR at 7-8), and the context of the Board's "enhanced competition" provisions in the larger railroad "open access" debate, it seems highly likely that the Board's requirement of "enhanced competition" could be intended (or might be construed) to mean that railroads proposing a major rail consolidation must, as a condition to approval of their combination, propose or accept measures to increase the number of railroads able to serve particular shippers or facilities, such as through trackage rights, open switching in terminal areas, joint use or other devices that increase direct rail-to-rail competition [4]

Requiring every railroad proposing a major rail consolidation, regardless of circumstances, to propose or accept regulatory measures to manufacture an artificial form of additional direct rail-to-rail competition as a precondition to approval of a proposed combination would be a serious mistake as a matter of sound transportation policy. The Board attempts to defend its proposed requirement of "enhanced competition" on the ground that increased competition is necessary to "offset" presumed merger-related public harms, but there is no sound basis for presuming that all future major rail consolidations will produce significant public harms or that the kind of manufactured rail-to-rail competition the Board seems to have in mind would actually (or invariably) produce offsetting public benefits. In any event, there is no nexus between the presumption of merger-related harms and the presumed benefits of measures to inject

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[4] The NPR is not, however, entirely clear in its discussion of the proposed new requirement of "enhanced competition." The Board states in its textual explanation of the proposed rules that the "focus of such a plan for enhancing competition *could be* placed on enhancing intramodal, or rail-to-rail, competition . . ." (NPR at 13) (emphasis added), as if to suggest that a plan for "enhanced competition" might satisfy the Board's requirements *without* providing for increased rail-to-rail competition. The Board should, at a minimum, clarify its intention.

additional rail-to-rail competition. More generally, the vagueness of the Board's requirement only invites endless demands, unconstrained by principled standards, for the kind of "open access everywhere" that the Board already found (correctly) to be beyond its statutory authority to impose on the railroad industry.

The Board should welcome and encourage rail consolidations that include provisions increasing competition -- including rail-to-rail competition -- but those proposals should come from the private sector (which must live with the transactions it proposes), and should be judged on a case-by-case basis on their individual merits. They should not be imposed under standards that are so vague and open-ended that they may deter otherwise beneficial rail combinations from even being proposed.

A. The Board's Presumptions About the Effects of Future Major Rail Consolidation Proposals

The Board attempts to justify its proposal to require "enhanced competition" as a precondition to public-interest approval of future major rail consolidation proposals on the ground that, absent such competition-enhancing conditions, future rail mergers are presumptively contrary to the public interest because: (1) they are unlikely to generate significant public benefits; (2) they are likely to produce irremediable competitive harms; and (3) they are likely to produce significant transitional service problems harmful to the public interest. NPR at 12-15. There is neither need nor warrant for enshrining any of these presumptions in the Board's Railroad Consolidation Procedures, and none supports the Board's proposal to require manufactured conditions to "enhance competition" in future major rail consolidation proceedings.

1. The Presumption That "Enhanced Competition" is Necessary Because Future Rail Mergers Will Not Yield Significant Efficiencies and Other Public Benefits

As an initial matter, the Board's proposal to require future major rail consolidation transactions to include provisions for "enhanced competition" seems to rest on a belief that future transactions will not generate significant public benefits. The Board suggests that, because "railroads have now reduced most or all of their excess capacity, and have greatly improved the efficiency of their operations," future major rail consolidations are unlikely, or at least much less likely, to generate efficiencies and other public benefits than prior rail consolidations. NPR at 10; *see also id.* at 14 ("the potential efficiency benefits of future large rail mergers will be more limited than in the past"). Apparently based on this supposition, the Board proposes to amend its rail merger policy statement to say only that it "*cannot rule out the possibility* that further consolidation of the few remaining Class I rail carriers could result in efficiency gains and improved service." NPR at 12 (proposed § 1180.1(c)) (emphasis added). Taken together, these statements appear to embody a presumption (albeit an apparently rebuttable one) that future major rail consolidations will not generate significant efficiencies or other public benefits, and that only by including provisions for increased rail-to-rail competition could these transactions produce net public benefits.

Any such presumption would be unfounded. The Board is surely correct in stating that the elimination of excess capacity should no longer be an overriding concern of national rail policy, and that railroads have become more efficient than they were two decades ago. But the Board and its predecessor have not seen a rail consolidation proposal justified on the ground that it would eliminate significant excess capacity in nearly 15 years, and it *rejected* that proposal on

the ground that it would eliminate direct, horizontal competition between the two applicant carriers.[5] Every other major rail consolidation considered by the Board and ICC since at least the Staggers Act has been approved based on findings, amply supported by the evidentiary record, that it would have efficiency-enhancing end-to-end, or vertical, effects. These effects include the extension of single-line service and associated elimination of costly and service-delaying interchanges, creation of shorter and more efficient rail routes and other network improvements, development of new markets for shippers, and cost reductions through elimination of administrative and overhead costs.[6]

As NS explained in its ANPR comments, particularly at this time in history, it would be short-sighted for the Board to adopt any presumption that future major rail consolidations will not generate these and other similar public benefits or that such merger-related public benefits will not be substantial. NS ANPR Opening at 11-12 & McClellan VS at 18-19. Market forces are pushing firms in all major industries toward greater consolidation. In particular, the business operations of the railroads' major customers and competitors (including trucks) are, with each passing day, increasingly national if not global in scope. Shippers increasingly demand, and competing carriers increasingly can offer, one-stop shipping and logistics services unconstrained by artificial geographical limitations in the size and scope of their networks. Just a few weeks ago, a major new study of the airline industry described how U.S. regulatory policy must be

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[5] *See Santa Fe Southern Pacific Corp. -- Control -- Southern Pacific Transportation Co.*, 2 I.C.C.2d 709 (1986), *pet. to reopen denied*, 3 I.C.C.2d 926 (1987).

[6] *See, e.g., CN/IC* at 46; *Conrail* at 133-34; *UP/SP* at 113-16; *BN/Santa Fe* at 59-63.

accommodated to the increasing global demands forcing airlines to expand the scale and scope of their operations and exploit to the fullest the efficiencies inherent in their network structure.[7]

Railroads are no different. To match the scale and scope of their customers and competitors, railroads may well be driven to expand the scale and scope of their operations to national scope, and to exploit the economies of scale, scope and density that continue to exist in the rail system. When trucking firms, express carriers (such as UPS and FedEx), intermodal marketing companies and even ocean carriers are increasingly offering shippers one-stop shipping services spanning the continent (and the globe), it would be short-sighted for the Board effectively to immobilize the railroad industry (and it alone) from reacting to changing market conditions through a presumption that the interests of rail customers would be served by requiring them to continue dealing with two or more railroads in order to move their cargo by rail across the United States.

NS by no means suggests that the Board should adopt a presumption that future major rail consolidations (including transcontinental mergers) would necessarily and in every instance generate significant net public benefits. But neither should the Board adopt any contrary presumption that future major rail consolidations would not yield significant efficiencies or other effects beneficial to the public interest. Applicants proposing a major rail combination should be required in each case to make a convincing showing of net public benefits. But nothing in the history of prior rail consolidation transactions or in the circumstances of current market conditions supports the notion that future rail consolidations will not generate significant net public

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[7] *See* "Airline Industry Turning Point: Driving Force in Globalization, or Laggard On Global Deregulation, Restructuring and Efficiency," Press Release (Nov. 1, 1999) (available at <http://biz.yahoo.com/bw/001101/dc_cambrid.html>) (visited Nov. 4, 2000).

benefits, or that imposition of competition-enhancing conditions can be justified on the theory that (absent such conditions) future rail mergers are not in the public interest.

2. The Presumption That "Enhanced Competition" is Necessary Because Future Rail Mergers Will Produce Anti-Competitive Effects That Cannot Effectively Be Remedied Through Conditions

The Board also attempts to justify its proposal to require "enhanced competition" as a condition to approval of future major rail consolidation proposals on the ground that such measures are necessary to offset presumed merger-related competitive harms that, according to the Board, could not effectively be remedied through conditions. The proposed policy statement thus recites the Board's belief that "additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately." NPR at 12 (proposed § 1180.1(c)); *see also id.* at 13 (citing "the difficulty of crafting appropriate conditions to mitigate competitive harm" as one justification for the proposed requirement of "enhanced competition"). The Board's proposed policy statement on merger conditions similarly declares that "the Board expects that any merger of Class I carriers will create some anticompetitive effects that are difficult to mitigate through appropriate conditions" and that, to offset "these harms," merger applicants must propose conditions to "enhance" competition. *Id.* at 16 (proposed § 1180.1(d)).

The Board's presumption that future major rail consolidations will inevitably produce adverse competitive effects and that these effects cannot practicably be mitigated through conditions is also unsupported and, in fact, contrary to the experience of prior rail consolidation proceedings. In support of its presumption of merger-related competitive harm, the Board suggests that exclusively served shippers enjoy competitive benefits from having "another carrier

nearby" and that it will be increasingly difficult in future mergers to preserve such competition "as the number of independent major railroads decreases, and the next available rail option moves farther away." NPR at 13. This argument might make sense in the context of hor[illegible]l, or parallel, rail consolidations, but the major rail consolidation proposals likely to come before the Board in the future will be largely end-to-end in nature, with little or no competitive overlap. It is *less*, not *more*, likely that future rail combinations will involve situations of the kind described by the Board.

Similarly, there is no basis for the Board's concerns about the potential irremediable loss of geographic competition in future major rail consolidation transactions. Geographic competition occurs by definition where a shipper that moves its traffic between origin and destination over the lines of one carrier could ship the same or a substitute product via a different rail carrier from a jointly served origin to an alternative destination or obtain the same or a substitute product via a different rail carrier from an alternative origin to a jointly served destination. This is precisely the situation to which the now accepted "2-to-1" competitive fixes typically apply. When, for example, a coal-burning electric utility plant is served directly by two railroads and could obtain its coal requirements from exclusively served mines served by either railroad, the combination of those two railroads would reduce the number of carriers serving the plant from two to one, and trigger now clearly established requirements for a competitive fix, such as through the grant of trackage rights or some other arrangement that would preserve the affected shipper's rail alternatives. In all recent rail consolidation transactions, the applicants have

volunteered measures that have effectively remedied these effects.[8] There is no reason to suppose, and the Board's NPR offers no basis on which to conclude, that similar merger-related reductions in competition (which are likely to be less, not more, common in future end-to-end combinations) cannot also be remedied through appropriately crafted conditions.

Even if a particular rail consolidation proposal would in certain locations reduce pre-existing competition that could not be effectively preserved through conditions, the Board's presumption of merger-related competitive harm still could not be sustained. Such competitive reductions could, in a particular transaction, be more than offset by transaction-related competitive *benefits*. Railroad consolidations can strengthen competition both between competing rail systems and between railroads and other transportation modes. These competitive gains may outweigh any isolated reductions in competition, even if those reductions cannot be mitigated through conditions. The Board's presumption fails to take into account the overall or *net* competitive impacts of a particular proposed rail merger.

The fundamental point here is that presumptions have no place in assessing the competitive effects of possible future major rail consolidations. Each proposal should be judged on its own merits based on evidence assessing the particular market conditions in which the proposal arises and in which its effects would be felt. If the proposed consolidation would reduce shippers' effective competitive options, the applicant carriers should be expected, as they have been in all recent rail consolidation proceedings, to propose measures to remedy these adverse effects, and the efficacy of those proposals should be weighed by the Board as one (admittedly important) factor in assessing the overall balance of public benefits and public harms attributable

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[8] *See, e.g., Conrail* at 34; *UP/SP* at 121-24; *BN/Santa Fe* at 12.

to the transaction. Requiring all rail consolidation applicants to propose or accept artificial measures to create additional rail-to-rail competition as a way of offsetting presumed competitive harms that may or may not exist simply does not make any sense. It would unreasonably burden, and very possibly discourage, otherwise desirable and beneficial rail combinations in a misguided attempt to remedy non-existent competitive harms.

3. The Presumption That "Enhanced Competition" is Necessary Because Future Rail Mergers Will Produce Transitional Service Problems

The third rationale offered by the Board for its proposed requirement of "enhanced competition" is that such measures to manufacture additional rail-to-rail competition are necessary in order to offset public harms resulting from presumed merger-related transitional service disruptions. This theme is sounded in several places in the proposed new rules. Section 1180.1(c) of the Board's proposed new merger policy states that "[a]dditional consolidations could also result in service disruptions during the system integration period." NPR at 12. Section 1180.1(c)(2) singles out "transitional service problems" as a potential public harm that, "[e]xperience shows," can result from the implementation of major rail consolidations, and recites that merger applicants must propose "enhanced competition" measures to offset these public harms. *Id.* at 15. The proposed policy statement on merger conditions repeats the Board's expectation that "transitional service disruptions may temporarily negate any shipper benefits" from a proposed combination, and directs that applicants must propose conditions to "enhance competition" in order to offset these presumed harms. *Id.* at 16 (proposed § 1180.1(d).

The Board's attempt to justify the artificial creation of additional rail-to-rail competition as a means of offsetting public harms from presumed merger-related service

disruptions is misguided on several levels. As an initial matter, it would be unwise for the Board to presume that future major rail consolidations (much less each and every one of them) will produce significant service disruptions. The Board's presumption no doubt is based on the service disruptions temporarily experienced during the initial implementation of recent major rail combinations, including the Conrail transaction and the UP/SP and BN/Santa Fe mergers. While admittedly serious, these service disruptions were temporary and quite varied in their scope, duration and cause. As the Board has itself found, the service crisis experienced in the UP/SP traced its roots in part to the inadequate rail infrastructure that UP inherited from SP and the inability of that deteriorated infrastructure to accommodate the traffic levels on the combined system.[9] The Conrail transaction, by contrast, involved the unprecedented division of the rail lines and facilities of a major railroad between two other railroads (including substantial facilities designated as joint Shared Assets Areas) -- unquestionably the most complicated and operationally challenging consolidation transaction in railroad history. It is unlikely that future major rail consolidation transactions (in all probability involving end-to-end mergers of relatively healthy systems with adequate rail infrastructure) will give rise to merger-related service disruptions of the size and scope of the problems experienced in these two cases. Most recent rail combinations have experienced problems in implementing the combining railroads' information technology systems, but these problems have also been short-term and of varying scope. At the very least, there is no reason to presume that future transactions will always give rise to service disruptions,

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[9] *See, e.g.*, STB Finance Docket No. 32760 (Sub-No. 26), *Union Pacific Corp. -- Control & Merger -- Southern Pacific Rail Corp.* (served Aug. 4, 1998), at 5.

nor any basis to make any intelligible judgments about the nature or extent of any such service problems.

It is also far less likely that future major rail consolidations will suffer the kind of service disruptions experienced most recently in the UP/SP and Conrail transactions because the applicant railroads, with the assistance of the Board, will take even more careful steps to ensure effective merger implementation. These steps could well include, for example, gradual integration of the combining carriers' operations and facilities in separate phases over an extended period of time, an approach that CN and IC appear (with some success) to have been following in implementing their recent merger. Such a phased or staggered approach to merger implementation was not practicably available to NS and CSX in implementing the Conrail transaction given the nature of that transaction as a separation and division of rail lines and facilities rather than a combination.

Even if future major rail consolidations could be expected to give rise to serious transitional service disruptions, moreover, there is no rational connection between those potential service problems and the competition-enhancing conditions the Board would impose as a means of offsetting them. It is illogical to require railroads to make structural changes in *competition* as a supposed means of remedying potential disruptions in *service*. Recent merger-related service disruptions have been caused by factors relating to inadequate infrastructure and short-term operating problems, not competitive deficiencies. Even more fundamentally, there is no logical or evidentiary nexus between the *temporary* transitional service disruptions the Board is presuming and the apparently *permanent* restructuring of market conditions the Board seems to be requiring. The Board's recently adopted emergency service rules properly recognize that access remedies for rail service deficiencies should be temporary, and limited in duration to the specific service

problems that justified the remedy in the first instance.[10] The Board's current proposals take no account of the obvious temporal mismatch between the presumed transitional service problems and the permanent restructuring of competition that the Board would apparently require to offset those service problems.

The Board's attempt to require "enhanced competition" to offset presumed merger-related service disruptions suffers from another, even more basic fallacy. The Board appears to be presuming that measures to inject an artificial form of increased rail-to-rail competition where market conditions have not produced it (such as through mandatory trackage rights or joint use arrangements, terminal switching, etc.) necessarily and invariably yield public *benefits*. Otherwise, these measures could not possibly serve to "offset" the presumed merger-related public harms, including public harms from transitional service problems. But regulatory forced access measures designed to increase the number of rail carriers serving particular shippers or facilities may just as easily *exacerbate* as relieve merger-related service problems. *See* NS ANPR Opening at 22-23, 42-43.[11]

Merger-related service disruptions often arise from unanticipated traffic congestion and, in the case of the Conrail transaction, the complexity of coordinating joint rail operations

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[10] *See* STB Ex Parte No. 628, *Expedited Relief for Service Inadequacies* (served Dec. 21, 1998) (codified at 49 C.F.R. §§ 1146-1147).

[11] As NS's prior discussion of forced access proposals makes clear, regulatory measures to increase direct rail-to-rail competition (such as trackage rights, switching and other joint use arrangements) can produce other harms to the rail network, including increased operating costs, erosion of the carriers' ability to recover their full economic costs (including fixed and common costs) through differential pricing, and reduced incentives for capital investment. NS ANPR Opening at 41-46. For this reason, imposing increased rail-to-rail competition as a merger condition will not always or invariably produce effects that are uniformly beneficial. To reflect this fact, NS requests the Board to include in its proposed merger policy statement on conditions additional language acknowledging the possible conflicting and uneven effects of access conditions. *See* Attachment A at 67 (proposed § 1180.1(d)).

over shared facilities. Giving an additional rail carrier the right to operate or provide competitive service over an already congested rail line would only aggravate the merger-related service problems and impede resolution of those prob' ms. That is why the Board sensibly included in its rules governing expedited remedies for rail service inadequacies a provision making clear that the Board will not impose a rail access remedy for service deficiencies when the additional rail access would degrade the ability of the incumbent carrier to serve its customers or to remedy its service problems. 49 C.F.R. § 1146(b)(1)(c). The Board's current proposal to require every rail merger applicant to agree to increased rail-to-rail competition as an "offset" to presumed merger-related service disruptions flies in the face of this straightforward fact of railroad operations.

In short, the Board should carefully assess and, with appropriately tailored conditions, seek to mitigate any temporary service disruptions likely to be associated with an approved major rail consolidation. But it would be wrong for the Board to presume that all future transactions will give rise to significant service disruptions or to impose inflexible requirements for *permanent* restructuring of rail competition as the cost for presumed service problems that might never occur and that could well only be exacerbated by the Board's requirement of "enhanced competition."

B. The Absence of Principled Standards For Imposing Measures For "Enhanced Competition"

Even if the Board were correct in believing that some sort of measures for increased rail-to-rail competition are necessary to offset public harms presumed to result from future proposed major rail consolidations, the Board's proposed new requirement of "enhanced competition" would still be unsound. The Board's proposed requirement of measures to increase rail-to-rail competition -- whether voluntarily proposed by the rail merger applicants or involun-

tarily imposed by the Board -- is so open-ended and so vaguely defined as to provide virtually no meaningful guidance to rail carriers contemplating a proposed rail merger or to other interested parties (and the Board itself) in determining the nature and scope of "enhanced competition" that will be required in order to satisfy the Board's new merger approval standards. A successful rail merger policy must provide guidance to interested parties so that they can have at least some idea whether a proposed rail consolidation they may be considering will have a reasonable chance of being approved and what conditions they are likely to be required to accept as the price of such approval. A successful merger policy must also provide similar guidance to other parties opposing or having an interest in a proposed consolidation. The Board's proposed merger rules, insofar as they would require "enhanced competition" unrelated to any direct transaction-related impacts, fail to provide any semblance of guidance.

The absence of any principled standards for judging the adequacy of the Board's proposed mandate of "enhanced competition" mirrors the intractable problems with the broad forced or "open access" proposals that the Board entertained in its ANPR and firmly rejected in the NPR. As NS explained in its ANPR comments, the demands by various shipper interests for increased rail-to-rail forced access rest on the premise (however misguided) that shippers should, wherever possible, be directly served by more than one rail carrier and that dual railroad service is always in the public interest. The difficulty, however, is that once this premise is accepted, there is no principled basis for limiting forced access in any way, or for deciding which shippers or facilities should be granted dual rail access through regulatory edict and which should not. *See* NS ANPR Opening at 27-30; NS ANPR Reply at 9-10, 41-45.

As NS has noted, the Board faced precisely this issue two years ago in the *Houston Gulf Coast Oversight* proceeding, where it was asked to impose an "open access" merger condition that would have required UP to open up all solely served shippers in the Houston terminal switching district to access by other railroads. The Board rejected the proposed condition on the ground that, among other things, the proposed "open switching" condition (dubbed the "Consensus Plan" by its proponents) was unrelated to the remediation of any direct, merger-related loss of competition and was not subject to any intelligible limiting principles. As the Board stated:

> The Consensus Plan is premised on the idea that shippers should, wherever possible, be served by more than one railroad . . . If we adopt the Consensus Plan, then there is no basis on which we could refuse to provide for open access throughout the rail system.

STB Finance Docket No. 32760 (Sub-No. 26), *Union Pacific Corp. -- Control & Merger -- Southern Pacific Rail Corp. [Houston Gulf Coast Oversight]*, Decision No. 10 (served Dec. 21, 1998), at 2. In recognition of the seemingly boundless scope of the requested "open access" conditions, the Board reaffirmed the traditional rule that competition-enhancing conditions may be imposed on a rail merger only to remedy direct, transaction-related losses of effective competition.

The same problem -- the absence of any limiting principles -- permeates the Board's current proposal to require rail merger applicants to submit to conditions requiring "enhanced competition." The Board's NPR makes clear that the requirement of "enhanced competition" -- itself an apparent code word for precisely the sorts of forced access measures considered in *Houston Gulf Coast Oversight* -- would be detached from the amelioration of any direct, merger-related reductions in competition. But once separated from the remediation of

merger-related competitive harm, there is no principled way to limit the scope of the Board-imposed "enhanced competition" and no principled way to decide which shippers should get "enhanced competition" and which should not. For example, if the applicants proposing a major rail consolidation proposed to create additional rail-to-rail competition through specific trackage rights grants or establishment of joint-use areas, affecting a specific group of rail customers, could other customers demand that additional rail access be granted for their traffic as well? It may be expected that many solely served rail customers would seek various sorts of forced access conditions under these circumstances. How would the Board decide which rail customers should be afforded conditions that increase rail-to-rail competition and which should not?

The Board's proposed new merger rules provide not even a clue as to how these fundamental questions might be answered. For this reason, the absence of any articulated standards in the Board's proposed rules requiring measures for "enhanced competition" means that future rail consolidation transactions (if they are proposed at all) are likely to become embroiled in STB merger-review proceedings in which shipper interests demand a host of coercive conditions designed to increase the number of railroads serving particular shipper facilities, regardless of whether the solely served nature of such facilities is affected by the proposed combination. The lack of any standards for when "enhanced" rail-to-rail competition should and should not be imposed by regulatory order makes it highly probable that every future major rail consolidation proceeding will be consumed with endless demands for broad "open access everywhere" conditions -- the very relief that the Board has correctly found to be beyond its existing statutory authority.

The ICC reached precisely this conclusion when, in the *UP MP* case, it rejected similar calls to use rail merger review as a vehicle for restructuring competitive relationships in the rail industry:

> If we were to consider public interest conditions in consolidation proceedings which are not related to possible harm arising from the merger, then we would open the door to a vast broadening of the scope of consolidation proceedings. Such a broadening of the scope of these proceedings would substantially increase their complexity. This would increase the time required to decide these cases, contrary to Congressional intent that railroad consolidation proceedings be handled expeditiously.

UP MP, 366 I.C.C. at 565. Similar consequences are likely to follow if the Board were to adopt its standardless requirement of "enhanced competition."

For these reasons, the Board should not adopt the proposed requirement of "enhanced competition" and should continue to follow the long-settled practice of granting competitive remedies in rail merger cases only to address, and ameliorate, direct transaction-related losses of competition in affected markets.[12]

C. Replacing the Board's Inflexible Requirement With A Case-by-Case Approach That Welcomes and Encourages Enhanced Competition

The Board's proposal to impose an inflexible (but standardless) requirement that rail merger applicants submit to measures for "enhanced competition" as a condition to approval of future major consolidations is unjustified and unworkable. This is not to say, however, that the Board's merger-review process can play no productive role in efforts to promote and facilitate

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[12] To implement this principle, NS suggests that the Board's proposed policy statement on merger conditions should be revised to state that "[c]onditions are also generally not appropriate to remedy competitive problems unrelated to the proposed consolidation or to effectuate changes in market structure or competitive conditions for reasons unrelated to the adverse effects of a proposed consolidation." *See* Attachment A at 68 (proposed § 1180.1(d)). This suggested change would simply codify longstanding principles of rail merger review.

measures to enhance direct rail-to-rail competition, or that the promotion of increased rail-to-rail competition should not be a relevant and important factor in weighing the public interest in future rail consolidations. Just as rail merger review has always treated enhancement of competition generally as a significant public interest factor in approving a proposed rail consolidation, the Board's merger rules should welcome -- indeed, they could affirmatively encourage -- proposals by rail merger applicants to increase direct rail-to-rail competition as part of their proposed transaction, at least when such measures can be justified within the overall structure and anticipated effects of the proposed transaction. The Board should also give such proposals by applicants significant weight in the overall public interest calculus, just as it did in the recent Conrail proceeding when it cited the introduction of new rail-to-rail competition in the Shared Assets Areas as an important public benefit supporting approval of the transaction.[13] But such measures to increase rail-to-rail competition should be considered on a case-by-case basis, not mandated in every case regardless of circumstances, and they should be proposed by the applicants, not imposed by regulatory order.

Retaining the Board's existing case-by-case approach to merger review, and encouraging (but not requiring) applicants to propose measures to increase rail-to-rail competition, makes better sense than the Board's proposal of a rigid requirement of "enhanced competition" in every case. A case-by-case approach makes more sense than the Board's proposed approach because, quite simply, proposed rail consolidations will differ in their effects (both beneficial and harmful) and will arise in economic circumstances that cannot be predicted now.

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[13] *See Conrail* at 129 ("[t]he most important public benefit resulting from the transaction will be a substantial increase in competition by allowing both CSX and NS to serve where only Conrail served before").

Whether, and to what extent, a particular measure to enhance rail-to-rail competition as part of a proposed combination would tip the public interest scales in favor of approval will differ in every case. As noted, some proposed major rail consolidations might well yield significant net public benefits without regard to enhancement of direct rail-to-rail competition, and should be approved even without such measures. The relative balance of public benefits and public harms, both with and without proposed conditions to "enhance competition," will differ in each case. Only an appropriately flexible case-by-case approach to merger review will be effective in taking account of each transaction's particular circumstances and anticipated effects.

It is also most appropriate to place on the merger applicants the initiative for formulating possible measures to increase direct rail-to-rail competition. The applicant carriers (and their shareholders) must ultimately bear both the financial consequences of the rail combination they propose and the risk of regulatory disapproval. And the applicants are in the best position, in formulating rail consolidation proposals, to balance the overall anticipated benefits and costs of the proposed transaction (both private and public) and to assess in particular the benefits and costs of particular pro-competitive measures that might be proposed as part of the transaction. If the overall merger proposal that the applicants put forward generates net public benefits, it should be approved. If the proposal would not yield net public benefits, it should not be approved. In either event, the Board's governing statute directs it to rely on private initiative in the formulation of rail merger proposals. This is as it should be.

Accordingly, NS urges the Board not to adopt the portions of its proposed new merger rules that would abandon the case-by-case approach in favor of a rigid requirement that rail merger applicants propose or accept in every case measures for "enhanced competition." The

provisions in Sections 1180.1(c), 1180.1(c)(2)(iv), 1180.1(d) and 1180.6(b)(10) of the Board's proposed rules incorporating this requirement of "enhanced competition" should be deleted. *See* Attachment A at 65, 67, 68 & 75. In their place, NS recommends that the Board adopt language embodying a policy affirmatively encouraging, but not requiring, competition-enhancing measures (including measures that increase direct rail-to-rail competition) as part of proposed rail consolidations and stating that such measures will be given substantial weight in the merger review process. The Board's proposed merger policy statement on "potential benefits" already provides that "[a] merger transaction can also improve existing competition or provide new competitive opportunities, and such enhanced competition will be given substantial weight in our analysis." NPR at 14 (proposed § 1180.1(c)(1)).[14] NS proposes to supplement this policy favoring pro-competitive consolidation proposals by including the following language

> In determining whether a proposed consolidation is consistent with the public interest, the Board will give substantial weight to conditions proposed by applicants to enhance competition in ways that strengthen and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).

id. at 68 (proposed § 1180.1(d)). In a similar vein, NS recommends that the Board's proposed rules governing the content of rail merger applications be revised to provide that applicants will be required to explain whether and how they would preserve and enhance competitive options (and service) and that "[a]pplicants' proposals to enhance competition or improve service will be given

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[14] NS recommends that the Board make a minor revision to this portion of the proposed merger policy statement on "potential benefits" by adding language making clear that a proposed consolidation can "improve existing competition" both by enhancing competition between railroads and by enhancing competition between railroads and other transportation modes. *See* Attachment A at 66 (proposed § 1180.1(c)(1)).

substantial weight by the Board in determining whether a proposed consolidation is consistent with the public interest." *Id.* at 76 (proposed § 1180.6(b)(10)(ii))

Adoption of the revisions suggested by NS would preserve the flexible, case-by-case approach to rail merger review that has served the agency, the rail industry and the shipping public well over the years, while still reflecting the Board's desire to tip the public interest scales in favor of proposals that would enhance competition, including direct rail-to-rail competition.

II. ASSESSMENT OF PUBLIC BENEFITS

As previously discussed, NS disagrees with the Board's presumption that future major rail consolidations are unlikely to generate significant public benefits in the form of improved service, efficiency gains and strengthened competition. Although several recent rail consolidation transactions (notably UP/SP and Conrail) experienced transitional service problems that to some degree may have delayed the achievement of the anticipated public benefits of those transactions, there is no sound basis for believing that future rail combinations will not generate significant efficiencies and other benefits to the shipping public. *See* pages 18-21, *supra*; NS ANPR Opening at 11-12 & McClellan VS at 18-20.

At the same time, however, the size, significance and potential risks associated with the type of major (potentially transcontinental) rail consolidations likely to come before the Board in the future make it appropriate as a policy matter for the Board to require merger applicants to make a more convincing showing of merger-related public benefits and to subject those benefits claims to closer scrutiny than has been customary in the past. *See* NS ANPR Opening at 12; NS ANPR Reply at 18-19. NS thus supports the Board's proposal to give closer scrutiny to applicants' claims of merger-related public benefits. NPR at 14 (proposed

§ 1180.1(c)(1)), 13 ("we would give increased scrutiny to claimed merger benefits"). More intense scrutiny of a proposed transaction's projected public benefits and other effects, however, cannot change the essential character of the merger impact analysis, which unavoidably entails at best only informed predictions about the effects of a proposed, but not yet implemented, consolidation transaction based on existing conditions and historical data. Increased scrutiny of claimed public benefits is warranted, but nothing can change the fact that estimates of merger-related public benefits are only estimates, whose realization in practice are dependent on a host of business and economic conditions that often cannot be anticipated and that typically are not even incorporated in merger impact analysis. *See* NS ANPR Opening at 13-14; NS ANPR Reply at 18-21.

Based on these considerations, NS urges the Board to make three relatively modest, but important, changes in its proposed merger policies and rules dealing with merger benefits analysis.

A. Increased Emphasis on Service Improvements in Rail Merger Review

The first sentence of the Board's proposed rail merger policy statement should be revised to emphasize the promotion of safe, reliable and efficient rail transportation *service* as a fundamental policy goal underlying the Board's review of proposed rail consolidations. As proposed by the Board in the NPR, this sentence is now focused exclusively on the goal of ensuring "balanced and sustainable competition in the railroad industry." NPR at 11 (proposed § 1180.1(a)).

NS believes that this singular focus on competition is too narrow. Competition is valued not for its own sake but only because, and to the extent that, it spurs railroads and other

carriers to provide safe, reliable and efficient transportation service, meeting the needs of the shipping public, at reasonable, self-sustaining rates. *See* page 11, *supra*. The ultimate objective of rail regulatory policy, including rail merger policy, should be to promote good rail service at reasonable rates. Particularly in light of the service problems with which the rail industry (including NS) has been struggling, the promotion of efficient, reliable and safe service should be the primary objective of rail merger policy. *See* NS ANPR Opening at 2-3, 17-18 (urging the Board to make rail service quality and service improvement the primary focus of rail merger review). At the very least, the opening section of the Board's rail merger policy statement should not elevate competition above service as a key ingredient of rail merger policy. NS would restore service considerations to their rightfully central place in merger analysis by adding to proposed Section 1180.1(a) a statement that the Board seeks to ensure balanced and sustainable competition in the rail industry "as well as safe, reliable and efficient services that meet the transportation needs of the shipping public." *See* Attachment A at 65 (proposed § 1180.1(a)). The Board should adopt this change.

B. Assessing Benefits Achievable By Means Short of Merger

One issue that generated considerable discussion during the Ex Parte No. 582 hearings this spring and in the comments filed in response to the Board's ANPR involved the treatment of claimed merger-related public benefits that might be achievable through inter-carrier alliances, operating agreements or other measures short of formal merger or consolidation. The Board itself suggested, and many parties agreed, that claimed efficiencies and other public benefits that could be achieved even in the absence of a formal merger or consolidation should not be counted as a transaction-related public benefit in the Board's merger review analysis. ANPR at 9.

NS's position on this question was that, because at least some types of benefits previously attributed to rail consolidations could potentially be achieved today by means short of merger, the Board's merger rules should make clear that the Board will not credit as a merger-related public benefit any claimed synergies or other benefits that could reasonably be achieved by the parties without a formal merger or consolidation. NS pointed out, however, that the Board's existing merger rules already incorporated such a "least restrictive alternatives" principle. 49 C.F.R. § 1180.1(c). NS therefore urged the Board to apply this principle more rigorously in future rail consolidation proceedings, and suggested that no textual change in the Board's merger rules was needed. NS ANPR Opening at 14-16; NS ANPR Reply at 18-19.

The Board's NPR proposes to retain, with minor non-substantive textual changes, the existing provision of the merger policy statement that "[w]hen evaluating the public interest, the Board will also consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation." NPR at 12 (proposed § 1180.1(c)). The Board proposes as well to add the following additional sentence: "The Board believes that other private sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public." *Id.*

NS suggests that this additional language be stricken. It is unnecessary, and conveys the impression that the Board has prejudged the issue and has already concluded that many of the public benefits likely to be offered in support of a proposed rail consolidation could be achieved by inter-carrier agreements short of merger. As NS's earlier comments and testimony explained, alliances and other inter-carrier agreements hold many promises, but they are difficult to negotiate and even more difficult to implement and sustain in practice. NS ANPR Opening at

15 & McClellan VS at 4-8. Moreover, the Board's most recent major rail merger decision addressing this issue, decided less than two years ago, concluded that the applicants' claimed merger benefits could *not* be achieved through alliances and other measures short of merger. (*NJC* at 45-48. At the very least, the question whether a particular claimed merger benefit could have been achieved through alliance or other inter-carrier agreement should be decided on the basis of specific evidence, and not on the basis of a presumption. The language of the Board's existing merger policy statement addressing this issue is more than sufficient, and should be retained without change. *See* Attachment A at 66 (proposed § 1180.1(c)).

C. Appropriate Measures if Projected Public Benefits Are Not Realized

Another issue that evoked considerable discussion during the earlier phases of this proceeding relates to the proper measures (if any) that rail merger applicants or the Board should take if merger-related public benefits that the applicants projected and the Board accepted during a rail merger proceeding ultimately are not realized or are not realized within the time frame originally predicted by the applicants. Apparently motivated by a concern that merger benefits projections in prior merger proceedings have not been accorded adequate scrutiny, and that transitional service disruptions have delayed the achievement of projected merger benefits in some recent rail combinations, the Board proposes to amend its merger policy statement to include the following provision:

> Applicants shall make a good faith effort to calculate the net public benefits their merger will generate, and the Board will carefully evaluate such evidence. To ensure that applicants have no incentive to exaggerate these projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner.

NPR at 14 (proposed § 1180.1(c)(1)); *see also id.* at 31 (proposed § 1180.6(b)(11)) (requiring applicants to "suggest additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner"). The Board apparently contemplates that the "additional measures" it might take if anticipated public benefits are not realized in a timely manner would be considered and imposed in the post-approval oversight proceeding the Board has separately proposed. *Id.* at 19 (proposed § 1180.1(g)) (requiring applicants to submit during oversight process evidence "that the merger benefit projections accepted by the Board are being realized in a timely fashion").

NS has no disagreement with the first of the two quoted sentences from Section 1180.1(c)(1) of the proposed policy statement. Applicants should be required to make a good faith estimate of net public benefits (and to calculate them if they are reasonably susceptible to quantification),[15] and the Board should carefully evaluate applicants' evidence on this subject. NS does take issue, however, with the second quoted sentence, which would require applicants at the beginning of a rail merger proceeding to propose "additional measures" that the Board might impose in a post-approval oversight process if projected public benefits are not realized in a timely manner (and the corresponding provision in proposed Section 1180.6(b)(11)). NS naturally does not favor rules that would encourage merger applicants to "exaggerate" their merger benefits

[15] As the Board has often recognized, many of the public benefits made possible by proposed rail consolidations are not subject to quantification. These unquantifiable public benefits include qualitative improvements in service, increased competition and other important benefits. *See, e.g., Conrail* at 133-34. As NS previously pointed out, the probable benefits of future major rail consolidation proposals are more likely to result from structural changes in rail service that are not susceptible to precise quantification. NS ANPR Opening at 11-12 & n.7.

claims,[16] but the Board's proposal to hold open the possibility of vague, after-the-fact post-approval sanctions for failure to achieve public benefits estimates is unrealistic, and fails to take into account the inherent nature of merger impact analysis.

As NS explained in its earlier comments,[17] the merger impact analyses that are contained in a rail consolidation application, including estimates of merger-related public benefits, necessarily reflect estimates or predictive judgments about a proposed transaction based on currently available information. In most respects, merger impact analyses are based on traffic studies and an operating plan that are predicated on traffic data for a prior, "base" year. The studies also reflect a static "before and after" analysis that deliberately seeks to factor out the effects of other economic conditions that affect railroad operations and financial performance as a means of isolating the effects of the proposed transaction itself.[18] Thus, traffic studies (which form the basis for the operating plan and calculation of public benefits submitted with a merger application) look at rail traffic patterns in some historic "base" year and seek to determine how those patterns would have been different if the proposed transaction had been implemented. Only by holding exogenous economic conditions (including traffic volumes, rates, costs and other economic variables) constant can these studies isolate the effects of the proposed transaction.[19]

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[16] Rail merger applicants have no incentive under existing procedures to "exaggerate" their claimed merger-related public benefits. Their benefits projections are subject to close scrutiny and adversarial testing during the merger review process. That process is sufficient to ensure that claims of merger benefits do reflect good faith estimates and are not exaggerated.

[17] *See* NS ANPR Opening at 13-14; NS ANPR Reply at 19-21.

[18] *See, e.g.*, STB Finance Docket No. 33388, *CSX Corp. -- Control & Operating Leases/Agreements -- Conrail Inc.*, Decision No. 18 (served Aug. 5, 1997), at 4.

[19] By contrast, if the traffic studies and other merger impact studies submitted with a rail consolida- (continued...)

The actual implementation of a proposed railroad consolidation, however, never takes place during the "base year" used for merger impact analysis. It necessarily occurs at some subsequent point in time, when the volume, mix and routing of freight traffic may be decidedly different than they were in the "base year." And railroad operations and performance are deeply affected by a host of real-world economic conditions that vary over time and that are not (and cannot be) reflected in the static analyses presented in rail merger applications. For these reasons, claimed merger benefits -- particularly those that applicants may be expected to quantify, such as projected cost savings -- might not be achieved to the same extent or on the same timetable as claimed in a merger application. The Board should therefore require sound, good faith merger benefits estimates and take reasonable measures to ensure that applicants seek to achieve them, but it is unrealistic to attempt to impose on applicants an absolute requirement that they achieve perfection in realizing the claimed merger benefits. Similarly, it is unrealistic to demand that merger applicants, while simultaneously being asked to put forward reasonable, good faith estimates of claimed merger benefits, also explain what measures they would propose if those good faith estimates turn out to be incorrect. Further, imposing a draconian requirement that merger applicants submit to after-the-fact Board-imposed conditions simply because projected merger benefits, despite applicants' best efforts, were not realized to the extent or within the time originally predicted by the applicants would be unfair and counterproductive.

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[9](...continued)
tion application sought to incorporate anticipated future changes in general economic and business conditions that might affect the volume, mix and routing of freight traffic, then it would be difficult if not impossible for the Board to assess whether certain predicted traffic gains or improved financial performance were attributable to the proposed consolidation or simply to improved business conditions that would have occurred even in the absence of the proposed consolidation.

NS believes that the appropriate role of the Board in assessing claimed merger benefits should be to scrutinize the claimed benefits rigorously and carefully, require the applicants to describe in detail the steps they intend to take to achieve the public benefits they claim their proposed consolidation will generate, and monitor the approved transaction during the implementation process to ensure that the applicants are doing the things they said they would do to achieve the claimed public benefits, or have a good reason why they are not. The Board should not use merger impact analyses (and claims of merger benefits) to prevent railroads from conducting their rail operations and providing service in the manner that best meets the needs of their customers in light of current, changing market and economic conditions.

Accordingly, NS recommends deletion of the language in proposed Sections 1180.1(c)(1), 1180.1(g) and 1180.6(b)(11) requiring applicants to specify and giving the Board authority to impose "additional measures" if claimed public benefits are not realized in a timely manner. *See* Attachment A at 66, 69 & 76. In place of this language, NS recommends that the Board incorporate in its merger policy statement on "potential benefits" the following language:

> Applicants shall specify with reasonable detail the measures they intend to take to implement the proposed merger and to achieve these projected merger-related benefits to the public. During the oversight process described in § 1180.1(g), the Board will monitor applicants' progress in achieving these projected merger-related public benefits and, should the anticipated public benefits fail to materialize in a timely manner, will reserve authority to remedy any unreasonable failure by applicants to implement the approved transaction or to fulfill any of the specific commitments made by applicants during the approval process.

See Appendix A at 66 (proposed § 1180.1(c)(1)). NS further recommends that the Board's proposed policy statement on the merger oversight process be revised correspondingly to include a requirement that applicants submit during the oversight process evidence "that the merger

benefit projections accepted by the Board have been realized in a timely fashion or that the failure to realize such projections is not the result of any unreasonable failure by applicants to implement the approved transaction or fulfill any specific commitments made during the approval process." *Id.* at 69 (proposed § 1180.1(g)).

The proposed changes NS is proposing here would properly hold merger applicants accountable for their projections of merger-related public benefits, and give the Board the tools it needs to ensure that commitments made during the merger review process are fulfilled, while simultaneously avoiding the imposition of unrealistic and inflexible requirements that merger applicants achieve projected merger benefits that are inconsistent with current, post-approval economic conditions and changes in rail operations and service responding to those changed conditions.

III. SERVICE ASSURANCE PLANS AND MERGER IMPLEMENTATION

In light of the serious service disruptions that have been experienced during the implementation of recent major rail consolidations (including the Conrail transaction), it is not surprising that a significant portion of the written comments submitted in response to the Board's ANPR were devoted to issues of merger implementation and the preservation and improvement of rail service. Most commenting parties (including NS) recommended that the Board modify its rules to require applicants to submit evidence describing in detail their plans for implementation of the proposed transaction and preservation of adequate rail service during and after the implementation period, and to formalize a process for ongoing monitoring and review of the merger implementation process. *See* NS ANPR Opening at 19-20; NS ANPR Reply at 22-28.

The Board's response to these comments is to propose new rules requiring submission and review of a "service assurance plan" ("SAP") as part of every major rail consolidation application and establishing a process for operational monitoring of approved transactions and problem-resolution procedures. NPR at 19-20 (proposed § 1180.1(h)), 35-37 (proposed § 1180.10). As a general matter, NS supports these new provisions, which may significantly improve the merger review and merger implementation process, especially as it relates to impacts on rail service. In particular, the proposed new provisions provide clear guidance as to the evidentiary requirements that would be imposed on merger applicants while preserving flexibility in how the required SAPs and Board review of service issues will be applied in individual cases.

NS has one textual suggestion to make in the proposed service provisions, and one general concern to express about the future application of the proposed new rules.

First, proposed Section 1180.10(a) of the new rules would require, as part of a SAP submitted with a rail merger application, an analysis of projected service levels "using benchmarks for the year immediately preceding the filing date of the application." NPR at 35. Because operating and traffic data for a calendar year immediately preceding the filing date of the application may often be unavailable in the case of merger applications filed early in a calendar year, NS suggests that the proposed rule be revised to require benchmark data for "the most recent 12-month period for which accurate and reliable data are available at the time the notice required by § 1180.4(b)(1) is filed." *See* Attachment A at 79 (proposed § 1180.10(a)).

Second, as NS discussed in its ANPR comments, it is critically important that the SAP (and the operational and service monitoring process in which it would be used) be viewed as a tool for implementing a proposed major rail consolidation, facilitating the preservation and

improvement of rail service during the implementation period and assisting in the resolution of merger-related service problems that may arise. NS ANPR Opening at 19-20, NS ANPR Reply at 23-28. If the SAP is to have any value in safeguarding rail service during the actual implementation of a rail merger and assisting all interested parties in ensuring successful merger implementation, it must be treated as an evolving, organic document which is continually revised and updated as traffic and market conditions change, merger implementation proceeds, and unanticipated developments or problems arise. As previously discussed, static operating plans and other merger impact studies that are based on historical traffic volumes and operating patterns during some prior historical "base" year cannot realistically or productively form the basis for actual implementation of an approved rail consolidation in some later period, when traffic and operating conditions have necessarily changed. Thus, in applying the proposed new rules requiring submission and review of SAPs, the Board must take care to ensure that these submissions do not become regulatory straitjackets on sound railroad operations, and that railroads have freedom to respond immediately to emerging service problems with necessary changes in operations, regardless of the plans described in their formal written submissions to the Board.[20]

NS thus understands that the Board's proposed rules requiring the submission and review of SAPs, and establishing a process for operational and service monitoring of approved rail consolidations, are focused properly on the merger implementation process and the preservation

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[20] As NS also explained in its earlier comments, the Board should be sensitive, in applying its proposed rules requiring operational monitoring, to the possibility that, at least for some railroads, some operating data ("metrics") may be unavailable or could be developed only at unreasonable cost. NS ANPR Reply at 25-28.

of adequate service during that critical period.[21] With that understanding, NS believes the proposed rules are sufficiently flexible to be applied in a manner that would not unreasonably impede the ability of merger applicants to modify their post-approval operations and service in response to changing business conditions

IV. OVERSIGHT

The NPR proposes to formalize and codify the Board's recent practice of imposing oversight conditions on approved major rail consolidations. Among other things, the proposed new rule establishes a five-year formal oversight period, requires applicants annually during that oversight period to submit evidence on merger impacts, and states that the Board "will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction." NPR at 19 (proposed § 1180.1(g)). The proposed rule for the most part is consistent with the oversight process that has been followed in recent cases and, for that reason, is generally acceptable. Nevertheless, NS believes that the Board should make three textual changes in the proposed rule.

First, for the reasons previously discussed in connection with the proposed rules governing assessment and monitoring of claimed merger-related public benefits, the Board's proposed policy statement on merger oversight should be modified to provide that the Board's oversight monitoring of claimed merger benefits should be focused on whether the originally projected public benefits have actually been achieved in timely fashion or, if they have not,

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[21] In this respect, the requirement of submission of a SAP should be regarded as similar to the Safety Integration Plans ("SIPs") that have been submitted in recent major rail consolidation proceedings. Those SIPs appropriately are addressed to safety issues related to the implementation of a proposed rail combination. SAPs should have a similar focus.

whether the failure to achieve them as originally projected is the result of any unreasonable failure by applicants to implement the approved transaction or to fulfill any of the commitments made during the merger review process. *See* pages 40-45, *supra*; Attachment A at 69 (proposed § 1180.1(g)).

Second, the proposed rule on oversight provides that the Board will retain jurisdiction to impose *additional* conditions on an approved rail merger transaction if necessary to remedy or offset unforeseen adverse consequences of the transaction. The Board unquestionably also has broad authority to *modify* or *remove* previously imposed merger conditions if, based on subsequent events or circumstances, the original conditions no longer serve the public interest. This authority exists wholly apart from any formalized merger oversight process.[22] Because the Board's proposed oversight policy refers expressly to the agency's authority to impose additional, post-approval merger conditions, it is appropriate that the Board also make clear its authority to modify or remove previously imposed conditions that are either no longer needed or that have become counterproductive. *See* Attachment A at 69 (proposed § 1180.1(g)) (Board shall retain jurisdiction not only to impose "additional conditions," but to "modify or remove any previously imposed conditions that are no longer necessary to achieve their original intended purpose or otherwise are not consistent with the public interest").

Third, NS is concerned that the language of the Board's proposed oversight rule, referring to the Board's retention of jurisdiction to "impose *any additional conditions it determines are necessary* to remedy or offset unforeseen adverse consequences of the underlying

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[22] *See, e.g.*, ICC Finance Docket No. 21215 (Sub-No. 5), *Seaboard Air Line Railroad Co. -- Merger -- Atlantic Coast Line Railroad Co. -- Petition to Remove Traffic Protective Conditions* (served Mar. 27, 1995) (removing previously imposed railroad merger condition).

transaction" (emphasis added), might be construed too broadly to give the Board a virtual roving commission to use the oversight process to restructure the approved (and consummated) rail consolidation transaction for reasons related less to the actual effects of the approved transaction than to subsequent changes in market conditions or structure. It has never been the function of the merger oversight process to give the agency *carte blanche* authority to alter the fundamental terms of an approved consolidation or impose new conditions not reasonably related to the original impacts of the transaction. Otherwise, the post-approval conditioning authority would raise grave constitutional due process issues.[23]

In order to ensure respect for the principle of finality in post-approval merger oversight, NS recommends that the Board incorporate in its oversight rule the statement that "[t]he Board will not use the oversight process to impose new conditions that would have the purpose or effect of restructuring the original approved transaction to address post-approval changes in market structure or competitive conditions unrelated to the original transaction." *See* Attachment A at 69 (proposed § 1180.1(g)). Adoption of this provision would assure future rail merger applicants that, by agreeing to consummate an approved rail consolidation subject to

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[23] In the normal situation, Board-imposed conditions are lawful exercises of regulatory authority in large part because a merger applicant has the ability to reject the conditions by declining to consummate the approved transaction and thereby decline to exercise the approval authority to which the condition is attached. When applicants agree to consummate an approved consolidation subject to specific conditions (including oversight conditions), the transaction almost invariably cannot be undone, particularly years after the fact. Thus, if the Board were to impose a new and additional condition during the oversight process, the applicants practicably would have no ability to refuse the condition. The mere fact that the Board reserves authority to monitor the approved transaction's progress during an oversight process cannot reasonably be construed as applicants' agreement to the Board's imposition of *any* post-approval condition, regardless of its relationship to original merger impacts. Construing the oversight authority as conferring on the Board such a blank check to impose post-approval conditions unrelated to the original effects of the transaction would raise issues of fundamental fairness and adequate notice to merger applicants.

appropriately crafted oversight conditions, they are not thereby subjecting themselves to involuntary post-approval changes in the fundamental terms of the approved transaction.

V. CUMULATIVE IMPACTS AND CROSSOVER EFFECTS

NS has previously expressed its support for the Board's proposal to repeal its "one case at a time" rule and to consider so-called downstream, cumulative and crossover impacts of a proposed major rail consolidation, including potential rail combinations that may be proposed in response to a particular consolidation transaction. NS ANPR Opening at 51-52; NS ANPR Reply at 15-18. With one important qualification, NS therefore supports the Board's proposed rule on cumulative impacts and crossover effects. NPR at 20-21 (proposed § 1180.1(i)).

NS's primary concern with the Board's proposed rule relates to the provision that would require merger applicants, in calculating the likely public benefits that their proposed consolidation would generate, to "measure these benefits in light of the anticipated downstream mergers." NPR at 20 (proposed § 1180.1(i)), *see also id.* at 31 (proposed § 1180.6(b)(12)). It would be impracticable for the Board to require merger applicants in effect to prepare alternative merger impact analyses (replete with separate operating plans, traffic studies, SAPs, pro forma financial statements, etc.) for every potential combination of hypothetical downstream rail consolidation transactions. Preparing such detailed studies for the proposed transaction alone is a massive undertaking. Doing so for hypothetical downstream transactions, which could well involve non-applicant carriers whose business plans and underlying traffic and other data are not reasonably available to the applicants, would be prohibitively burdensome. Because of the inherent speculation involved in analyzing purely hypothetical downstream transactions, more-

over, such an exercise would be unlikely to yield information helpful to the Board's merger review.

NS does not understand the Board's proposed rule to require this level of detail and precision in applicants' assessment of downstream effects. This understanding is suggested by the portion of the proposed rule stating that the Board "expects applicants to anticipate *with as much certainty as possible* what additional Class I merger applications are likely to be filed in response to their own application and explain how these applications, taken together, *could affect the eventual structure of the industry and the public interest.*" NPR at 20 (proposed § 1180.1(i)) (emphasis added). This language would appear to give applicants and the Board appropriate flexibility to present reasonable analyses of potential downstream effects. The Board would do well, however, to clarify its intent.

VI. TRANSNATIONAL ISSUES

The Board's proposed rules include a new provision requiring applicants to submit "full system" competitive analyses and operating plans, incorporating applicants' rail operations in Canada or Mexico, from which the Board can assess all transaction-related impacts within the United States. NPR at 21 (proposed § 1180.1(k)); *id.* at 34 (proposed § 1180.8(a)). The proposed new rule would also require, in connection with proposed rail consolidations that would result in foreign control of a Class I railroad, analysis of specific transnational issues. NPR at 21 (proposed § 1180.1(k)); *id.* at 37 (proposed § 1180.11).

In the recent BNSF/CN proceeding, NS was an early advocate of a "full-system" operating plan assessing the interdependent effects of the proposed combination on the parties' complete rail systems both in the United States and Canada. In its ANPR comments, NS also

strongly supported the adoption of a requirement of full-system operating plans and other merger impact analyses. NS ANPR Opening at 62-63, NS ANPR Reply at 57-58. As NS explained in its earlier comments, the Board's case-by-case approach to merger review is sufficiently broad to accommodate the consideration of foreign-control and other transnational issues that may be raised in particular cases, and changes in the Board's existing rules to address such matters would be unnecessary. NS ANPR Reply at 57-58. NS does not, however, oppose the proposed rules the Board has proposed to deal with these matters.

VII. ENVIRONMENT AND SAFETY

The Board's proposed new policies and rules for major rail combinations include only limited provisions dealing with the assessment of merger-related environmental effects. This apparently reflects a judgment by the Board that a more comprehensive review of the treatment of environmental impacts in rail merger proceedings is not warranted at this time. Based on its extensive and ongoing experience with the Conrail transaction, however, NS is convinced that the time has come for the Board to reexamine its environmental impact review procedures in major rail consolidation cases and that several changes in the Board's proposed rules in this area are needed at this time.[24]

With due respect to the Board and its diligent staff, the environmental review process has become far too costly and burdensome to the applicants and other parties, and it lacks

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[24] With respect to safety issues, the proposed rules include provisions requiring rail merger applicants to work with the FRA to develop an appropriate Safety Integration Plan ("SIP"). NPR at 18 (proposed § 1180.1(f)(2)). The Board and FRA have separately proposed regulations dealing with SIPs and the safety impact review of proposed rail mergers, and the Board has stated that, until the proposed rules are finalized, safety integration issues should be considered on a case-by-case basis. *Id.* at 18. NS concurs. NS ANPR Opening at 52-53; NS ANPR Reply at 58-59.

necessary predictability and finality. At least part of the cause for these problems involves institutional considerations and, in particular, the Board's practice of relying on outside or third-party consultants whose work is directed by the Board's professional staff but whose costs are borne by merger applicants, who have little control over the nature and scope of the work undertaken by the retained consultants or the costs of their work.[25] This procedure creates conditions in which there is little incentive to constrain costs or to weigh the costs of a particular set of environmental analyses with the anticipated benefits of such analyses to the overall decisionmaking process. In connection with the Conrail transaction, NS and CSX have already borne over $26 million in expenses for outside environmental consultants selected by the Board. This figure does not even include the enormous costs of the consultants and attorneys retained directly by NS and CSX to assist in this elaborate process -- including, notably, efforts to respond to the requests of the third-party consultants for additional data, information and analysis and to assess and respond to the Board staff's environmental impact analysis and proposed mitigation measures -- or the costs of the NS and CSX personnel involved in the ongoing environmental review process. Assessing environmental effects of a large consolidation like the Conrail transaction is an important and worthy exercise, but NS submits that this process has become too costly and uncertain, with far too much variability in the methodologies and analyses employed by the third-party consultants.

Another problem in the Board's environmental impact analysis in rail consolidation cases is that the process has increasingly become detached from the assessment of direct, merger-

[25] NS understands that the Board's practice of retaining outside environmental consultants is due in no small part to the agency's budgetary constraints, over which the Board has relatively little control. Nonetheless, the practice has yielded undesirable policy consequences.

related changes in rail operations and service. Instead, the process has increasingly become fixated on identifying and remedying environmental conditions that do not trace their origin to the direct effects of the proposed rail consolidation, or that are affected by changes in traffic volumes and traffic patterns that have less to do with the terms of the proposed transaction than they do with ongoing fluctuations in traffic volumes and other changes in market conditions. What is more, the process seems to demand not that adverse environmental impacts in certain discrete areas be weighed against other merger-related environmental benefits (and other non-environmental public benefits) in the overall approval process, but that every discrete adverse effect must be remedied in its own right -- a result that appears to go beyond the mandate of the National Environmental Policy Act to ensure that environmental effects of a proposed federal action are taken into account in federal government decisionmaking.

In light of this recent experience with the Board's environmental impact review process in rail consolidation cases, NS suggests the following changes in the Board's merger rules.

First, the Board should adopt a rule making clear that, in assessing the environmental effects of a proposed rail consolidation, the Board will follow the same balancing approach that it employs in assessing other effects of a proposed transaction, and that it will confine its environmental impact analysis to direct, merger-related impacts (both beneficial and adverse), rather than normal changes in business and market conditions unrelated to the immediate and direct effects of the proposed consolidation. Specifically, NS proposes the addition of the following rule in the proposed new merger policy statement on environment and safety:

> The potential impacts of a proposed consolidation on the environment and on safety, whether beneficial or adverse, are important factors that the Board will

> consider in determining whether a proposed transaction is consistent with the public interest. The Board's environmental and safety impact analysis focuses on effects resulting from the proposed transaction, rather than on pre-existing conditions not caused or exacerbated by the proposed transaction or on post-approval changes in rail operations and service that are a product of normal commercial responses to changing traffic levels and other economic conditions. Adverse environmental or safety effects of a proposed consolidation may be outweighed by other public benefits from the transaction including, among other things, beneficial impacts of the proposed consolidation on the environment or on safety.

See Attachment A at 68 (proposed § 1180.1(f)(1)). This provision would acknowledge that the environmental impact analysis of proposed rail consolidations properly should focus on direct merger impacts, and that discrete adverse environmental impacts of a transaction should be weighed and balanced against beneficial environmental impacts and beneficial non-environmental public impacts of the transaction.

Second, the Board's proposed new merger rules include a provision strongly encouraging merger applicants to enter into negotiated agreements with state and local agencies and individual communities to resolve issues over potential adverse effects of a proposed rail consolidation on a particular locality. NPR at 17-18 (proposed § 1180.1(f)(1)). NS is concerned that the language of this proposed rule may give undue weight to negotiated agreements and, specifically, might have the unintended effect of implicitly penalizing applicants if they are unable to negotiate agreements that satisfy localities and resolve environmental impact concerns over a proposed rail consolidation. Such a result would unfairly and artificially skew the negotiations between rail applicants and affected localities, and encourage private parties to pursue unreasonable "hold up" negotiating strategies. NS suggests that this imbalance could be rectified by modifying the proposed new rule to include the statement that "[i]n the absence of such voluntarily negotiated agreements, the Board will determine whether any unresolved issues regarding

the effects of a proposed consolidation on the environment or safety should be addressed in the proceeding and, if so, the Board will independently resolve such issues." *See* Attachment A at 69 (proposed § 1180.1(f)(2)). With this change, the proposed merger policy statement would appropriately and strongly encourage negotiated resolution of environmental impact disputes but provide that, if a negotiated agreement cannot be reached, the Board should proceed to render an independent decision resolving the dispute and addressing the merits of the claimed environmental impact concerns.

Third, although beyond the immediate scope of the proposed new rail merger rules, NS urges that the Board undertake a reexamination of its environmental review process in rail consolidation proceedings. In particular, the Board should reconsider its extensive use of applicant-funded outside consultants in the environmental review process and, at a minimum, should consider measures to reduce the costs of the environmental review process to more reasonable levels.

VIII. EMPLOYEE PROTECTION

The Board has proposed no changes in the content, administration or enforcement of its standard employee protective conditions and has not otherwise proposed to depart from its settled approach to employee issues in connection with future railroad consolidation transactions. The Board addresses employee issues as part of its proposed new merger policy statement, in which the Board proposes to declare that it: (1) supports "early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors"; (2) "respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very

limited extent necessary to carry out an approved transaction"; (3) "will review negotiated agreements to assure fair and equitable treatment of all affected employees", and (4) will normally impose employee protection at the level mandated by law, but may impose "more stringent protection" if necessary in a particular case. NPR at 17 (proposed § 1180.1(e)). In its accompanying commentary, the Board explains that its proposed policy reflects the agency's continued emphasis on the resolution of merger-related employee issues through voluntarily negotiated agreements between carriers and unions rather than through formal regulatory action. *Id.*[26]

NS adopts the comments submitted by the National Railway Labor Conference and offers the following additional comments.

NS supports the Board's adherence to existing employee protection policy. In particular, we agree that it is appropriate for the Board to continue to apply its standard employee protective conditions in all but extraordinary cases; that the Board properly declined to adopt the benefits enhancements that had been proposed by various labor commentators; and that the Board properly declined invitations to disavow or otherwise modify its settled and judicially approved standards for modification of labor agreements.

That being said, NS believes that some of the wording of the proposed policy statement should be modified in order to prevent misunderstanding and avoid disputes in the

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[26] The Board also states that it is "seriously considering" proposals for unspecified "new rules to govern contentious issues, such as the need for employees to relocate in order to retain their jobs." NPR at 17. The Board's standard protective conditions already provide the most generous benefits in American industry, and enhancements are not warranted. In any event, NS assumes that if the Board decides to proceed with additional rulemaking, it will do so in accordance with the Administrative Procedure Act (5 U.S.C. § 553 (b)-(d)), permitting interested parties an appropriate opportunity to comment on the specific rules proposed.

future. The third sentence of the statement, referring to the "sanctity of collective bargaining agreements" and declaring that the Board will "look with extreme disfavor" on their override "except to the very limited extent necessary to carry out an approved transaction" (NPR at 17), might be misinterpreted (by arbitrators and parties) as announcing some new standard for modification of labor agreements. Under the Board's settled standards, a collective bargaining agreement may be modified only to the extent necessary for implementation of an authorized transaction.[27] NS suggests that the third sentence of the statement should be reworded in the terms of the Board's familiar "necessity" standard, or omitted altogether, in order to avoid unnecessary confusion and conflict.

Finally, NS is concerned that the proposed statement leaves some room for confusion concerning the Board's treatment of implementing agreements negotiated voluntarily under Article I, § 4 of the Board's standard protective conditions. The proposed statement specifically provides that the Board "will review negotiated agreements to assure fair and equitable treatment of all affected employees." NPR at 17. In the Board's existing policy statement (49 C.F.R. § 1180.1(f)), the same language means that the Board will review voluntarily negotiated *protective arrangements*. NS is confident that the Board did not mean to say, as

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[27] *See* STB Finance Docket No. 28905 (Sub-No. 22), *CSX Corp. -- Control -- Chessie System, Inc. & Seaboard Coast Line Industries, Inc. (Arbitration Review)* (served Sept. 25, 1998), at 25 ("A CBA [collective bargaining agreement] override can be had only if such override is necessary to carry out a transaction approved under 49 U.S.C. 11344(c) [now 11324(c)]") ("*Carmen III*"); ICC Finance Docket No. 28905 (Sub-No. 27), *CSX Corp. -- Control -- Chessie System, Inc. & Seaboard Coast Line Industries, Inc. (Arbitration Review)* (served Dec. 7, 1995), at 12 ("It is well settled that we have the authority to modify collective bargaining agreements when modification is necessary to obtain the benefits of a transaction that we have approved in the public interest"), *aff'd sub nom. United Transportation Union v. STB*, 108 F.3d 1425 (D.C. Cir. 1997); *Railway Labor Executives Association v. United States*, 987 F.2d 806, 815 (D.C. Cir. 1993) ("necessity" for modifying a CBA requires showing "that the modification is necessary in order to secure to the public some transportation benefit flowing from the underlying transaction"; quoted with approval in *Carmen III*).

the placement of this language in the proposed new policy statement could suggest, that the Board is now proposing to review *implementing agreements* voluntarily negotiated under Article I, § 4 of the *New York Dock* or other standard protective conditions. There would be no justification for the Board's routinely reviewing *New York Dock* implementing agreements that are necessarily the products of mutual accommodation and compromise and acceptable to both carriers and unions. NS urges the Board to clarify that it is simply proposing to reaffirm its existing practice of reviewing voluntarily negotiated protective arrangements that are intended by the parties to apply in place of *New York Dock* -- not *New York Dock* implementing agreements themselves.

To these ends, NS proposes that the following specific language be substituted for the proposed Section 1180.1(e):

> **Labor protection.** The Board is required to provide adequate protection to the rail employees of applicants who are affected by a consolidation. Absent a negotiated protective arrangement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement. The Board will review negotiated protective arrangements to assure fair and equitable treatment of all affected employees. The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. In the absence of voluntary agreement, the override of collective bargaining agreements will be permitted only to the extent necessary to carry out an approved transaction.

See Attachment A at 68 (proposed § 1180.1(e)).

IX. SHORT-LINE AND REGIONAL RAILROAD ISSUES

As NS explained in its ANPR comments, short-line and regional railroads play an important role in meeting the Nation's needs for rail freight transportation service. All Class I rail carriers (including NS) have a strong interest in promoting the development of viable short-line

and regional railroads whose operations are supported by market conditions. It is therefore entirely appropriate that the Board, in assessing the effects of a proposed major rail consolidation, consider potential adverse impacts of the transaction on smaller carriers. NS ANPR Opening at 53-55; NS ANPR Reply at 52-54. The Board's proposed new merger rules include several new provisions that would require applicants in major rail consolidation proceedings, as well as the Board, to assess the potential impacts of a proposed transaction on Class II and Class III rail carriers.[28] These proposals are sound, and NS supports them.

X. OTHER EVIDENTIARY AND PROCEDURAL REQUIREMENTS

The Board has proposed a number of revisions to the sections of its Railroad Consolidation Procedures prescribing the evidentiary requirements for rail merger applications and the procedures to be followed in rail consolidation cases. NS suggested a number of the changes proposed by the Board. NS ANPR Opening at 63-69. NS wishes to comment on only two of the proposed new rules in these areas.

A. Production of Traffic Tapes

NS supports the Board's proposal to require rail merger applicants to make their 100% traffic tapes available to interested parties upon request as soon as practicable after the issuance of a protective order in a rail consolidation proceeding. NPR at 25 (proposed § 1180.4(b)(4)(iii)). NS had suggested this idea in its ANPR comments (NS ANPR Opening at 67), and welcomes the Board's decision to embrace this proposal. NS recommends, however, that the text of the Board's proposed rule on this point be revised to make clear that the traffic

[28] *See, e.g.*, NPR at 15 (proposed § 1180.1(c)(2)), 16 (proposed § 1180.1(d)), 19 (proposed § 1180.1(h)(1)), 30-31 (proposed § 1180.6(b)(10)), 32-33 (proposed § 1180.7(b)), 35 (proposed § 1180.10(a)).

tapes that applicants shall be required to make available to other parties shall include traffic data for the same year that applicants select as their "base year" for merger impact analysis. *See* Attachment A at 72 (proposed § 1180.4(b)(4)(iii)). This technical revision would make the rule more clear and eliminate potential uncertainty in the applicants' mandatory-disclosure obligation.

B. Market Impact Analysis

The Board's proposed revisions to its rules governing the content and format of market impact analyses include a number of new requirements that merger applicants submit detailed market share and traffic data organized by origin/destination, interregional or corridor flows and patterns of geographic or product competition. NPR at 32-33 (proposed § 1180.7(b)). NS is uncertain about the need for and relevance of certain of the data the Board's new rules would require. In any event, NS is concerned that at least some of the types of detailed data the Board's proposed rules would require applicants to submit may be unavailable in current or reliable form or have deficiencies that make them less than wholly reliable in producing the kind of market share and other statistics required by the Board's proposed rules. For example, while the proposed rules would require submission of detailed market share data broken down by mode, currently available traffic data for non-rail freight movements is uneven and subject to a number of deficiencies, particularly when sought at the level of movement-specific detail for which traffic data for rail freight movements is available. Thus, even if non-rail traffic data could be readily developed, the reliability of such data may be inferior to comparable data for rail movements when presented for specific origin/destination pairs or specific movements. Data limitations also persist for traffic movements outside the U.S. Even with respect to the data that do exist, inconsistencies in the manner in which such data are organized might well prevent the compilation of the kind of

detailed market share statistics the Board's proposed rules would appear to require. Because of these data deficiencies, NS suggests that the Board's rule be revised to make clear that the duty of rail merger applicants to develop and submit the required information is limited "to the extent reliable data exist." *See* Attachment A at 77 (proposed § 1180.7(b)).

CONCLUSION

For all of the foregoing reasons, the Board should adopt amended major rail consolidation procedures and rules consistent with NS's foregoing comments.

Respectfully submitted,

Vincent F Prada

J. Gary Lane
Joseph C. Dimino
George A. Aspatore
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2600

G. Paul Moates
Jeffrey S. Berlin
Vincent F. Prada
Constance A. Sadler
Krista L. Edwards
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
(202) 736-8711 (fax)

Attorneys for Norfolk Southern Corporation and Norfolk Southern Railway Company

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ATTACHMENT A

NORFOLK SOUTHERN'S PROPOSED REVISIONS TO STB'S PROPOSED RAIL CONSOLIDATION PROCEDURES

[Proposed additions noted in boldface double-underlined text; proposed deletions noted in bracketed strikethrough text.]

For the reasons set forth in the preamble, Title 49, Subtitle B, Chapter X, Part 1180 of the Code of Federal Regulations is proposed to be amended as follows.

PART 1180--RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

1. The authority citation for part 1180 continues to read as follows.

Authority: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323-11325.

2. Section 1180.0 is proposed to be revised to read as follows:

§ 1180.0 Scope and purpose.

The regulations in this subpart set out the information to be filed and the procedures to be followed in control, merger, acquisition, lease, trackage rights, and any other consolidation transaction involving more than one railroad that is initiated under 49 U.S.C. 11323. Section 1180.2 separates these transactions into four types: Major, significant, minor, and exempt. The informational requirements for these types of transactions differ. Before an application is filed, the designation of type of transaction may be clarified or certain of the information required may be waived upon petition to the Board. This procedure is explained in § 1180.4. The required contents of an application are set out in §§ 1180.6 (general information supporting the transaction), 1180.7 (competitive and market information), 1180.8 (operational information), 1180.9 (financial data), 1180.10 (service assurance plans), and 1180.11 (additional information needs for transnational mergers). A major application must contain the information required in §§ 1180.6(a), 1180.6(b), 1180.7(a), 1180.7(b), 1180.8(a), 1180.8(b), 1180.9, 1180.10, and 1180.11. A significant application must contain the information required in §§ 1180.6(a), 1180.6(c), 1180.7(a), 1180.7(c), and 1180.8(b). A minor application must contain the information required in §§ 1180.6(a) and 1180.8(c). Procedures (including time limits, filing requirements, participation requirements, and other matters) are contained in § 1180.4. All applications must comply with the Board's Rules of General Applicability, 49 CFR parts 1100 through 1129, unless otherwise specified. These regulations may be cited as the Railroad Consolidation Procedures.

3. Section 1180.1 is proposed to be revised to read as follows:

§ 1180.1 General policy statement for merger or control of at least two Class I railroads.

(a) General. To meet the needs of the public and the national defense, the Surface Transportation Board seeks to ensure balanced and sustainable competition in the railroad industry **as well as safe, reliable and efficient services that meet the transportation needs of the shipping public**. The Board recognizes that the railroad industry (including Class II and III carriers) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports. The Board welcomes private sector initiatives that enhance the capabilities and the competitiveness of this transportation infrastructure. Although mergers of Class I railroads may advance our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board does not favor consolidations that reduce the railroad and other transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. Such public benefits include improved service, enhanced competition, and greater economic efficiency. The Board also will look with disfavor on consolidations under which the controlling entity does not assume full responsibility for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand.

(b) Consolidation criteria. The Board's consideration of the merger or control of at least two Class I railroads is governed by the public interest criteria prescribed in 49 U.S.C. 11324 and the rail transportation policy set forth in 49 U.S.C. 10101. In determining the public interest, the Board must consider the various goals of effective competition, carrier safety and efficiency, adequate service for shippers, environmental safeguards, and fair working conditions for employees. The Board must ensure that any approved transaction will promote a competitive, efficient, and reliable national rail system.

(c) Public interest considerations. The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits -- such as improved service, enhanced competition, and greater economic efficiency -- outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms. ~~[Although the Board cannot rule out the possibility that further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. To maintain a balance in favor of the public interest, merger applications must include provisions for enhanced competition. Unless merger applications are so framed, approval of proposed combinations where both carriers are financially sound will likely cause the Board to make broad use of the powers available to it in 49 U.S.C. 11324(c) to condition its approval to preserve and enhance competition.]~~ When evaluating the public interest, the Board will also consider whether the benefits claimed by applicants could be realized by means other than the

proposed consolidation **that would result in less potential harm to the public** [~~The Board believes that other private sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public.~~]

(1) Potential benefits. By eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density, mergers can generate important public benefits such as improved service, enhanced competition, and greater economic efficiency. A merger can strengthen a carrier's finances and operations. To the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies will be shared with shippers and consumers. Both the public and the consolidated carrier can benefit if the carrier is able to increase its marketing opportunities and provide better service. A merger transaction can also improve existing competition **(including competition between rail carriers and competition between rail carriers and other transportation modes)** or provide new competitive opportunities, and such enhanced competition will be given substantial weight in our analysis. Applicants shall make a good faith effort to calculate the net public benefits their merger will generate, and the Board will carefully evaluate such evidence. [~~To ensure that applicants have no incentive to exaggerate these projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner.~~] **Applicants shall specify with reasonable detail the measures they intend to take to implement the proposed merger and to achieve these projected merger-related benefits to the public. During the oversight process described in § 1180.1(g), the Board will monitor applicants' progress in achieving these projected merger-related public benefits and, should the anticipated public benefits fail to materialize in a timely manner, will reserve authority to remedy any unreasonable failure by applicants to implement the approved transaction or to fulfill any of the specific commitments made by applicants during the approval process.**

(2) Potential harm. The Board recognizes that consolidation can impose costs as well as benefits. It can reduce competition both directly and indirectly in particular markets, including product markets and geographic markets. Consolidation can also threaten essential services and the reliability of the rail network. In analyzing these impacts we must consider, but are not limited by, the policies embodied in the antitrust laws.

(i) Reduction of competition. Although in specific markets railroads operate in a highly competitive environment with vigorous intermodal competition from motor and water carriers, mergers can deprive shippers of effective options. Intramodal competition is reduced when two carriers serving the same origins and destinations merge. Competition in product and geographic markets can also be eliminated or reduced by end-to-end mergers. Any railroad combination entails a risk that the merged carrier will acquire and exploit increased market power. Applicants shall propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for

one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Harm to essential services. The Board must ensure that essential freight, passenger, and commuter rail services are preserved. An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available. The Board's focus is on the ability of the nation's transportation infrastructure to continue to provide and support essential services. Mergers should strengthen, not undermine, the ability of the rail network to advance the nation's economic growth and competitiveness, both domestically and internationally. The Board will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services.

(iii) Transitional service problems. Experience shows that significant service problems can arise during the transitional period when merging firms integrate their operations, even after applicants take extraordinary steps to avoid such disruptions. Because service disruptions harm the public, the Board, in its determination of the public interest, will weigh the likelihood of transitional service problems. In addition, under paragraph (h) of this section, the Board will require applicants to provide a detailed service assurance plan. Applicants also should explain how they will cooperate with other carriers in overcoming natural disasters or other serious service problems during the transitional period and afterwards.

~~[(iv) Enhanced competition. To offset harms that would not otherwise be mitigated, applicants shall explain how the transaction and conditions they propose will enhance competition.]~~

(d) Conditions. The Board has broad authority under 49 U.S.C. 11324(c) to impose conditions on consolidations, including divestiture of parallel tracks or requiring the granting of trackage rights and access to other facilities. The Board will condition the approval of Class I combinations to mitigate or offset harm to the public interest, and will carefully consider conditions proposed by applicants in this regard. The Board will impose conditions that are operationally feasible and produce net public benefits so as not to undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier. **In this regard, the Board recognizes that trackage rights and other conditions granting competing carriers or shippers access to or the right to use facilities of the applicant carriers may be necessary to ameliorate merger-related harm to competition, but it also recognizes that these types of access conditions may increase rail operating costs, impair the quality and reliability of rail service, reduce the applicant carriers' ability to recover their fixed and common costs through differential pricing and undermine economic incentives for efficient capital investment in rail infrastructure. The Board therefore will impose such conditions only when they (i) are necessary to remedy adverse competitive effects of the proposed consolidation, (ii) would not endanger the operational or financial success of the consolidated carriers and (iii) would produce net public benefits.** Conditions are generally not appropriate to compensate parties who may be disadvantaged by increased

competition. **Conditions are also generally not appropriate to remedy competitive problems unrelated to the proposed consolidation or to effectuate changes in market structure or competitive conditions for reasons unrelated to the adverse effects of a proposed consolidation.** ~~[In this regard, the Board expects that any merger of Class I carriers will create some anticompetitive effects that are difficult to mitigate through appropriate conditions, and that transitional service disruptions may temporarily negate any shipper benefits. Therefore, to offset these harms, applicants will be required to propose conditions that will not simply preserve but also enhance competition. The Board seeks to enhance competition in ways that strengthen and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).]~~ **In determining whether a proposed consolidation is consistent with the public interest, the Board will give substantial weight to conditions proposed by applicants to enhance competition in ways that strengthen and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).**

(e) Labor protection. The Board is required to provide adequate protection to the rail employees of applicants who are affected by a consolidation. **Absent a negotiated protective arrangement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement. The Board will review negotiated protective arrangements to assure fair and equitable treatment of all affected employees.** The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. ~~[Otherwise, the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction. The Board will review negotiated agreements to assure fair and equitable treatment of all affected employees. Absent a negotiated agreement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement.]~~ **In the absence of voluntary agreement, the override of collective bargaining agreements will be permitted only to the extent necessary to carry out an approved transaction.**

(f) Environment and safety. **(1) The potential impacts of a proposed consolidation on the environment and on safety, whether beneficial or adverse, are important factors that the Board will consider in determining whether a proposed transaction is consistent with the public interest. The Board's environmental and safety impact analysis focuses on effects resulting from the proposed transaction, rather than on pre-existing conditions not caused or exacerbated by the proposed transaction or on post-approval changes in rail operations and service that are a product of normal commercial responses to changing traffic levels and other economic conditions. Adverse environmental or safety effects of a proposed consolidation may be outweighed by other public benefits from the transaction including, among other things, beneficial impacts of the proposed consolidation on the environment or on safety.**

[~~(1)~~] (2) We encourage negotiated agreements between railroad-applicants and affected communities, including groups of neighborhood communities and other entities such as state and local agencies. Agreements of this nature can be extremely helpful and effective in addressing local and regional environmental and safety concerns, including the sharing of costs associated with mitigating merger-related environmental impacts. **In the absence of such voluntarily negotiated agreements, the Board will determine whether any unresolved issues regarding the effects of a proposed consolidation on the environment or safety should be addressed in the proceeding and, if so, the Board will independently resolve such issues.**

[~~(2)~~] (3) Applicants will be required to work with the Federal Railroad Administration, on a case-by-case basis, to formulate Safety Integration Plans to ensure that safe operations are maintained throughout the merger implementation process. Applicants will also be required to submit evidence about potentially blocked grade crossings as a result of merger-related traffic increases.

(g) Oversight. As a condition to its approval of any major transaction, the Board will establish a formal oversight process. For at least the first 5 years following approval, applicants will be required to present evidence to the Board, on no less than an annual basis, to show that the merger conditions imposed by the Board are working as intended, that the applicants are adhering to the various representations they made on the record during the course of their merger proceeding, that no unforeseen harms have arisen that would require the Board to alter existing merger conditions or impose new ones, [~~and that the merger benefit projections accepted by the Board are being realized in a timely fashion~~] **and that the merger benefit projections accepted by the Board have been realized in a timely fashion or that the failure to realize such projections is not the result of any unreasonable failure by applicants to implement the approved transaction or fulfill any specific commitments made during the approval process.** Parties will be given the opportunity to comment on applicants' submissions, and applicants will be given the opportunity to reply to the parties' comments. During the oversight period, the Board will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset unforeseen adverse consequences of the underlying transaction **or to modify or remove any previously imposed conditions that are no longer necessary to achieve their original intended purpose or otherwise are not consistent with the public interest. The Board will not use the oversight process to impose new conditions that would have the purpose or effect of restructuring the original approved transaction to address post-approval changes in market structure or competitive conditions unrelated to the original transaction.**

(h) Service assurance and operational monitoring. (1) Good service is of vital importance to shippers. Accordingly, applicants must file, with the initial application and operating plan, a service assurance plan, identifying the precise steps to be taken to ensure continuation of adequate service and to provide for improved service. This plan must include the specific information set forth at § 1180.10 on how shippers and connecting railroads (including Class II and III carriers) across the new system will be affected and benefitted by the proposed consolidation. As part of

this plan, the Board will require applicants to establish contingency plans that would be available to address the negative impacts if projected service levels do not materialize in a timely fashion

(2) The Board will conduct extensive post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate.

(3) We will require applicants to establish problem resolution teams and specific procedures for problem resolution to ensure that post-merger service problems, related claims issues, and other matters are promptly addressed. Also, we would envision the establishment of a Service Council made up of shippers, railroads, and other interested parties to provide an ongoing forum for the discussion of implementation issues.

(i) Cumulative impacts and crossover effects. Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components, the Board cannot evaluate the merits of a major transaction in isolation — the Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to anticipate with as much certainty as possible what additional Class I merger applications are likely to be filed in response to their own application and explain how these applications, taken together, could affect the eventual structure of the industry and the public interest. When calculating the likely public benefits that their merger will generate, applicants are to measure these benefits in light of the anticipated downstream mergers. Applicants will be expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, following approval by us of any future consolidation(s).

(j) Inclusion of other carriers. The Board will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.

(k) Transnational issues. (1) Future merger applications may present novel and significant transnational issues. In cases involving major Canadian and Mexican railroads, applicants must submit "full system" competitive analyses and operating plans — incorporating their operations in Canada or Mexico — from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States. With respect to rail safety in the United States, applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the national origins of merger applicants. When an application would result in foreign control of a Class I railroad, applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network, and applicants must address how any ownership restrictions imposed by foreign governments should affect our public interest assessment.

(2) The Board will consult with relevant officials as appropriate to ensure that any conditions it imposes on a transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination.

(l) National defense. Rail mergers must not detract from the ability of the United States military to rely on rail transportation to meet the nation's defense needs. Applicants must discuss and assess the national defense ramifications of their proposed merger.

(m) Public participation. To ensure a fully developed record on the effects of a proposed railroad consolidation, the Board encourages public participation from federal, state, and local government departments and agencies; affected shippers, carriers, and rail labor, and other interested parties.

4. Section 1180.3 is proposed to be amended by revising paragraphs (a) and (b) to read as follows:

§ 1180.3 Definitions.

(a) Applicant. The term applicant means the parties initiating a transaction, but does not include a wholly owned direct or indirect subsidiary of an applicant if that subsidiary is not a rail carrier. Parties who are considered applicants, but for whom the information normally required of an applicant need not be submitted, are:

(1) in minor trackage rights applications, the transferor and

(2) in responsive applications, a primary applicant.

(b) Applicant carriers. The term applicant carriers means: any applicant that is a rail carrier; any rail carrier operating in the United States, Canada, and/or Mexico in which an applicant holds a controlling interest; and all other rail carriers involved in the transaction. This does not include carriers who are involved only by virtue of an existing trackage rights agreement with applicants.

* * * * *

5. Section 1180.4 is proposed to be amended by revising paragraph (a)(1) to read as follows, by removing paragraph (a)(4), by adding new paragraphs (b)(4) and (c)(6)(vi) to read as follows, and by revising paragraphs (d), (e)(2), (e)(3), and (f)(2) to read as follows:

§ 1180.4 **Procedures.**

(a) * * * (1) The original and 25 copies of all documents shall be filed in major proceedings. The original and 10 copies shall be filed in significant and minor proceedings.

* * *

(4) [Removed]

(b) * * *

(4) When filing the notice of intent required by paragraph (b)(1) of this section, applicants also must file:

(i) A proposed procedural schedule. In any proceeding involving either a major transaction or a significant transaction, the Board will publish a FEDERAL REGISTER notice soliciting comments on the proposed procedural schedule, and will, after review of any comments filed in response, issue a procedural schedule governing the course of the proceeding.

(ii) A proposed draft protective order. The Board will issue, in each proceeding in which such an order is requested, an appropriate protective order.

(iii) A statement of waybill availability for major transactions. Applicants must indicate, as soon as practicable after the issuance of a protective order, that they will make their 100% traffic tapes available (subject to the terms of the protective order) to any interested party on written request. **The 100% traffic tapes shall include traffic for the same year to be used for the impact analysis.** The applicants may require that, if the requesting party is itself a railroad, applicants will make their 100% traffic tapes available to that party only if it agrees, in its written request, to make its own **corresponding** 100% traffic tapes available to applicants (subject to the terms of the protective order) when it receives access to applicants' tapes.

(iv) A proposed voting trust. In each proceeding involving a major transaction, applicants contemplating the use of a voting trust must inform the Board as to how the trust would insulate them from an unlawful control violation and as to why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. Following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust.

(c) * * *

(6) * * *

(vi) The information and data required of any applicant may be consolidated with the information and data required of the affiliated applicant carriers

(d) Responsive applications. (1) No responsive applications shall be permitted to minor transactions.

(2) An inconsistent application will be classified as a major, significant, or minor transaction as provided for in § 1180.2(a) through (c). The fee for an inconsistent application will be the fee for the type of transaction involved. See 49 CFR 1002.2(f)(38) through (41). The fee for any other type of responsive application is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(3) Each responsive application filed and accepted for consideration will automatically be consolidated with the primary application for consideration.

(e) * * *

(2) The evidentiary proceeding will be completed

(i) Within 1 year (after the primary application is accepted) for a major transaction,

(ii) Within 180 days for a significant transaction, and

(iii) Within 105 days for a minor transaction.

(3) A final decision on the primary application and on all consolidated cases will be issued:

(i) Within 90 days (after the conclusion of the evidentiary proceeding) for a major transaction;

(ii) Within 90 days for a significant transaction; and

(iii) Within 45 days for a minor transaction.

* * *

(f) * * *

(2) Except as otherwise provided in the procedural schedule adopted by the Board in any particular proceeding, petitions for waiver or clarification must be filed at least 45 days before the application is filed.

* * * * *

6. Section 1180.6 is proposed to be amended by revising paragraphs (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), and (b)(8) to read as follows, and by adding new paragraphs (b)(9), (b)(10), (b)(11), (b)(12), and (b)(13) to read as follows

§ 1180.6 Supporting information.

* * * * *

(b) * * *

(1) Form 10-K (exhibit 6). Submit: the most recent filing with the Securities and Exchange Commission (SEC) under 17 CFR 249.310 if made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form 10-K subsequently filed with the SEC over the duration of the proceeding.

(2) Form S-4 (exhibit 7). Submit: the most recent filing with the SEC under 17 CFR 239.25 if made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form S-4 subsequently filed with the SEC over the duration of the proceeding.

(3) Change in control (exhibit 8). If an applicant carrier submits an annual report Form R-1, indicate any change in ownership or control of that applicant carrier not indicated in its most recent Form R-1, and provide a list of the principal six officers of that applicant carrier and of any related applicant, and also of their majority-owned rail carrier subsidiaries. If any applicant carrier does not submit an annual report Form R-1, list all officers of that applicant carrier, and identify the person(s) or entity/entities in control of that applicant carrier and all owners of 10% or more of the equity of that applicant carrier.

(4) Annual reports (exhibit 9). Submit: the two most recent annual reports to stockholders by each applicant, or by any entity that is in control of an applicant, made within 2 years of the date of filing of the application. These shall not be incorporated by reference, and shall be updated with any annual or quarterly report to stockholders issued over the duration of the proceeding.

* * *

(6) Corporate chart (exhibit 11). Submit a corporate chart indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity (with each chart indicating the percentage ownership of every company on the chart by any other company on the chart). For each company: include a statement indicating whether that company is a noncarrier or a carrier; and identify every officer and/or director of that company who is also an officer and/or director of

any other company that is part of a different corporate family, which includes a rail carrier. Such information may be referenced through notes to the chart.

* * *

(8) Intercorporate or financial relationships. Indicate whether there are any direct or indirect intercorporate or financial relationships at the time the application is filed, not disclosed elsewhere in the application, through holding companies, ownership of securities, or otherwise, in which applicants or their affiliates own or control more than 5% of the stock of a non-affiliated carrier, including those relationships in which a group affiliated with applicants owns more than 5% of the stock of such a carrier. Indicate the nature and extent of such relationships, if they exist, and, if an applicant owns securities of a carrier subject to 49 U.S.C. Subtitle IV, provide the carrier's name, a description of securities, the par value of each class of securities held, and the applicant's percentage of total ownership. For purposes of this paragraph (b)(8), "affiliates" has the same meaning as "affiliated companies" in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).

(9) Employee impact exhibit. The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impacts will occur, the time frame of the impacts (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. This information (except with respect to employee protection agreements) may be set forth in the following format:

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES

Current Location	Classification	Jobs Transferred to	Jobs Abolished	Jobs Created	Year

(10) Conditions to mitigate and offset merger harms. Applicants are expected to propose measures to mitigate and offset merger harms. ~~[These conditions should not simply preserve, but also enhance, competition.]~~ **Applicants should also describe any proposed measures to enhance competition or improve service.**

(i) Applicants must explain **whether and** how they will preserve competitive options for shippers and for Class II and III rail carriers. At a minimum, applicants must explain **whether and** how they will preserve the use of major gateways, the potential for build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement. **Applicants' proposals to preserve such competitive options will be given substantial weight by the Board in determining whether a proposed consolidation is consistent with the public interest.**

(ii) Applicants must explain **whether and** how the transaction and conditions they propose will enhance competition and improve service. **Applicants' proposals to enhance competition or improve service will be given substantial weight by the Board in determining whether a proposed consolidation is consistent with the public interest.**

(11) Calculating public benefits. Applicants must enumerate and, where possible, quantify the net public benefits their merger will generate (if approved). In making this estimate, applicants should identify the benefits arising from service improvements, enhanced competition, cost savings, and other merger-related public interest benefits. Applicants must also identify, discuss, and, where possible, quantify the likely negative effects approval will entail, such as losses of competition, potential for service disruption, and other merger-related harms. [~~In addition, applicants must suggest additional measures that the Board might take if the anticipated public benefits identified by applicants fail to materialize in a timely manner.~~]

(12) Downstream merger applications. (i) Applicants should anticipate what additional Class I merger applications are likely to be filed in response to their own application and explain how, taken together, these applications could affect the eventual structure of the industry and the public interest.

(ii) Applicants are expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should the Board approve additional future rail mergers.

(iii) In calculating the public benefits arising from their merger, applicants should measure them in light of the anticipated downstream merger applications.

(13) Purpose of the proposed transaction. The purpose sought to be accomplished by the proposed transaction, e.g., improving service, enhancing competition, strengthening the nation's transportation infrastructure, creating operating economies, and ensuring financial viability.

* * * * *

7. Section 1180.7 is proposed to be revised to read as follows:

§ 1180.7 Market analyses.

(a) For major and significant transactions, applicants shall submit impact analyses (exhibit 12) that describe the impacts of the proposed transaction — both adverse and beneficial — on inter- and intramodal competition with respect to freight surface transportation in the regions affected by the transaction and on the provision of essential services by applicants and other carriers. An impact analysis should include underlying data, a study on the implications of those data, and a description of the resulting likely effects of the transaction on transportation alternatives available to the shipping public. Each aspect of the analysis should specifically address significant impacts as they relate to the applicable statutory criteria (49 U.S.C. 11324(b) or (d)),

essential services, and competition. Applicants must identify and address relevant markets and issues, and provide additional information as requested by the Board on markets and issues that warrant further study. Applicants (and any other party submitting analyses) must demonstrate both the relevance of the markets and issues analyzed and the validity of the methodology. All underlying assumptions must be clearly stated. Analyses should reflect the consolidated company's marketing plan and existing and potential competitive alternatives (inter- as well as intramodal). They can address: city pairs, interregional movements, movements through a point, or other factors; a particular commodity, group of commodities, or other commodity factor that will be significantly affected by the transaction; or other effects of the transaction (such as on a particular type of service offered).

(b) For major transactions, applicants shall submit "full system" impact analyses (incorporating any operations in Canada or Mexico) from which they must demonstrate the impacts of the transaction — both adverse and beneficial — on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product competition, and geographic competition) and the provision of essential services (including freight, passenger, and commuter) by applicants and other network links (including Class II and Class III rail carriers and ports). Applicants' impact analyses must at least provide the following types of information **to the extent reliable data exist**:

(1) The anticipated effects of the transaction on traffic patterns, market concentrations, and/or transportation alternatives available to the shipping public. Consistent with § 1180.6(b)(10), these must incorporate a detailed examination of the ways in which the transaction would **preserve or** enhance competition and of the specific measures proposed by applicants to preserve **or enhance** existing levels of competition and essential services;

(2) Actual and projected market shares of originated and terminated traffic by railroad for each major point on the combined system before and after the proposed transaction. Applicants may define points as individual stations or as larger areas (such as Bureau of Economic Analysis statistical areas or U.S. Department of Agriculture Crop Reporting Districts) as relevant and indicate the extent of switching access and availability of terminal belt railroads. Applicants should list points where the number of serving railroads would drop from two to one and from three to two, respectively, as a result of the proposed transaction (both before and after applying proposed remedies for competitive harm);

(3) Actual and projected market shares of revenues and traffic volumes before and after the proposed transaction for major interregional or corridor flows by major commodity group. Origin/destination areas should be defined at relevant levels of aggregation for the commodity group in question. The data should be broken down by mode and (for the railroad portion) by single-line and interline routings (showing gateways used). Applicants should explain relevant differences in the effectiveness of competing routings (with respect, e.g., to transit time, terrain, track conditions, and capacity);

(4) For each major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual and projected revenues and traffic volumes before and after the proposed transaction,

(5) Maps and other graphic displays where helpful in illustrating the analyses in this section;

(6) An explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services; and

(7) Supporting data for the analyses in this section, such as the basis for projections of changes in traffic patterns, including shipper surveys and econometric or other statistical analyses If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

(c) For significant transactions, specific regulations on impact analyses are not provided so that the parties will have the greatest leeway to develop the best evidence on the impacts of each individual transaction. As a general guideline, applicants shall provide supporting data that may (but need not) include: current and projected traffic flows; data underlying sales forecasts or marketing goals; interchange data; market share analysis; and/or shipper surveys. It is important to note that these types of studies are neither limiting nor all inclusive. The parties must provide supporting data, but are free to choose the type(s) and format. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

8. Section 1180.8 is proposed to be amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively, and by adding a new paragraph (a) to read as follows

§ 1180.8 Operational data.

(a) For major transactions applicants must submit a "full system" operating plan incorporating any prospective operations in Canada and Mexico – from which they must demonstrate how the proposed transaction will affect operations within regions of the United States and this nation as a whole.

(1) Safety integration plan. Applicants must submit a safety integration plan

(2) Blocked crossings. Applicants must indicate what measures they plan to take to address potentially blocked grade crossings as a result of merger-related changes in operations or increases in rail traffic.

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9. A new § 1180.10 is proposed to be added to read as follows:

§ 1180.10 Service assurance plans.

For major transactions: service assurance plan. Applicants shall submit a service assurance plan, which, in concert with the operating plan requirements, will identify the precise steps to be taken by applicants to ensure that projected service levels are attainable and that key elements of the operating plan will improve service. The plan shall describe with reasonable precision how operating plan efficiencies will translate into present and future benefits for the shipping public. The plan must also describe any potential area of service degradation that might result due to operational changes. The plan must encompass:

(a) Integration of operations. Based on the operating plan, and using benchmarks for the ~~[year immediately preceding the filing date of the application]~~ **the most recent 12-month period for which accurate and reliable data are available at the time the notice required by §1180.4(b)(1) is filed,** applicants must describe how the transaction will result in improved service levels and must identify potential instances where service may be degraded. While precise in nature, this description is expected to be a route level review rather than a shipper-by-shipper review. Nonetheless, the plan should be sufficient for individual shippers to evaluate the projected improvements and respond to the potential areas of service degradation for their customary traffic routings. The plan should inform Class II and III railroads and other connecting railroads of the operational changes that may have an impact on their operations, including operations involving major gateways.

(b) Coordination of freight and passenger operations. If Amtrak or commuter services are operated over the lines of the applicant carriers, applicants must describe definitively how they will continue to operate these lines to fulfill existing performance agreements for those services. Whether or not the passenger services operated are over lines of the applicants, applicants must establish operating protocols that ensure effective communications with Amtrak and/or regional rail passenger operators in order to minimize any potential transaction-related negative impacts.

(c) Yard and terminal operations. The operational fluidity of yards and terminals is key to the successful implementation of a transaction and effective service to shippers. Applicants must describe how the operations of principal classification yards and major terminals will be changed or revised and how these revisions will affect service to customers. As part of this analysis, applicants must furnish dwell time information for one year prior to the transaction for each facility described above, and estimate what the expected dwell time will be after the revised

operations are implemented. Also required will be a discussion of on-time performance for the principal yards and terminals in the same terms as required for dwell time.

(d) Infrastructure improvements. Applicants must identify potential infrastructure impediments (using volume/capacity line and terminal forecasts), formulate solutions to those impediments, and develop timeframes for resolution. Applicants must also develop a capital improvement plan (to support the operating plan) for timely funding and completing the improvements critical to transition of operations. They should also describe improvements related to future growth, and indicate the relationship of the improvements to service delivery.

(e) Information technology systems. Because the accurate and timely integration of applicants' information systems are vitally important to service delivery, applicants must identify the process to be used for systems integration and training of involved personnel. This must include identification of the principal operations-related systems, operating areas affected, implementation schedules, the realtime operations data used to test the systems, and pre-implementation training requirements needed to achieve completion dates. If such systems will not be integrated and on line prior to implementation of the transaction, applicants must describe the interim systems to be used and how those systems will assure service delivery.

(f) Customer service. To achieve and maintain customer confidence in the transaction and to ensure the successful integration and consolidation of existing customer service functions, applicants must identify their plans for the staffing and training of personnel within or supporting the customer service centers. This discussion must include specific information on the planned steps to familiarize customers with any new processes and procedures that they may encounter in using the consolidated systems and/or changes in contact locations or telephone numbers.

(g) Labor. Applicants must furnish a plan for reaching necessary labor implementing agreements. Applicants must also provide evidence that sufficient qualified employees to effect implementation will be available at the proper locations prior to the transaction.

(h) Training. Applicants must establish a plan to provide necessary training to employees involved with operations, train and engine service, operating rules, dispatching, payroll and timekeeping, field data entry, safety and hazardous material compliance, and contractor support functions (i.e., crew van service), as well as to other employees in functions that will be affected by the transaction.

(i) Contingency plans for merger-related service disruptions. In order to address potential disruptions of service that may occur, applicants must establish contingency plans. Those plans, based upon available resources and traffic flows and density, must identify potential areas of disruption and the risk of occurrence. Applicants must provide evidence that contingency plans are in place to minimize negative service impacts and promptly restore service.

(j) Timetable. Applicants must identify all major functional or system changes/consolidations that will occur and the time line for successful completion.

10. A new § 1180.11 is proposed to be added to read as follows:

§ 1180.11 Additional information needs for transnational mergers.

(a) Applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the national origins of merger applicants.

(b) Applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations, and be detrimental to the interests of the United States, and discuss any ownership restrictions imposed on them by foreign governments.

(c) Applicants must discuss and assess the national defense ramifications of the proposed merger.

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of November, 2000, I served the foregoing "Comments of Norfolk Southern in Response to Notice of Proposed Rulemaking" by causing a copy thereof to be delivered by first-class mail, postage prepaid, to each of the persons listed on the Board's official service list in this proceeding.

Vincent F. Prada

Vincent F. Prada